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In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. MARKS, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the mere fact that a matter has been referred by the Attorney General to an independent counsel under 28 U.S.C. § 594(e) preclude a district court from reviewing whether that independent counsel has legal authority to prosecute the matter before the court?

2. May the Attorney General refer a matter to an independent counsel under 28 U.S.C. § 594(e) based on "administrative convenience" alone, as opposed to a factual relationship between the matter at issue and the subject matter of the independent counsel's jurisdiction?

3. May a court of appeals disqualify a district judge pursuant to 28 U.S.C. § 455(a), on the ground that the judge's "impartiality might reasonably be questioned," even though the motion to disqualify is made for the first time on appeal, the factual basis for the disqualification request was known to the movant at the district court level prior to receiving the adverse ruling which is complained of on appeal, the factual basis for the request consists entirely of non-record newspaper and magazine articles, and such articles suggest, at most, that the judge is a friend of the spouse of a political acquaintance of a party to the lawsuit?

LIST OF PARTIES

Petitioner and Defendant Below ..... William J. Marks, Sr.

Respondent ..... United States of America

Defendant Below ..... Jim Guy Tucker

Defendant Below ..... John H. Haley

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PETITION FOR WRIT OF CERTIORARI

The petitioner, William J. Marks, Sr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on March 15, 1996.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Eighth Circuit is reported at 78 F.3d 1313. It is reproduced in the Appendix hereto at pages App. 1-29. The judgment of the Court of Appeals for the Eighth Circuit denying rehearing by the panel and rehearing *en banc*, with dissenting opinion, is reported at 82 F.3d 1423. It is reproduced in the Appendix hereto at pages App. 30-50. The judgment and opinion of the United States District Court for the Eastern District of Arkansas is unpublished. It is reproduced in the Appendix hereto at pages App. 51-85.

JURISDICTION INVOKED

The district court had jurisdiction over the underlying federal criminal action pursuant to 18 U.S.C. § 3231. On September 5, 1995, the district court dismissed the indictment against the defendants in its entirety. Respondent filed a notice of appeal that same day. The Court of Appeals for the Eighth Circuit therefore had jurisdiction over respondent's appeal pursuant to 28 U.S.C. § 1291.

On March 15, 1996, the court of appeals entered its judgment reversing the dismissal of the indictment and ordering reassignment of the case, upon remand, to a "judge other than Judge [Henry] Woods." Each of the defendants timely filed requests for rehearing and suggestions for rehearing *en banc*. On May 6, 1996, the panel denied the defendants' requests for rehearing, and the entire court of appeals, three judges dissenting, denied the defendants' suggestions for rehearing *en banc*. The jurisdiction of this Court to review the

judgment and order of the court of appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

This case involves the fundamental constitutional principle of separation of powers.

The case also involves the Appointments Clause of Article II of the Constitution, which reads as follows:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The case involves Title VI of the Ethics in Government Act, as reenacted by the Independent Counsel Reauthorization Act of 1994 (hereinafter "Independent Counsel Act" or "Act"), 28 U.S.C. §§ 591-599 (1994). The principal statutory provision at issue is 28 U.S.C. § 594(e), which provides in pertinent part:

> **(e) Referral of other matters to an independent counsel.** – An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters *related to the independent counsel's prosecutorial jurisdiction*, and the Attorney General or the division of the Court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral *if the matter relates to the independent counsel's jurisdiction*. . . .

28 U.S.C. § 594(e) (1994) (emphasis supplied). The case also involves § 593(c) of the Independent Counsel Act, which provides:

> (c) **Expansion of jurisdiction.** –
>
> (1) **In general.** – The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction of an independent counsel, and such expansion may be in lieu of the appointment of another independent counsel.
>
> (2) **Procedure for request by independent counsel.** –
>
> (A) If the independent counsel discovers or receives information about possible violations of criminal law by persons as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determinations required by section 592, the Attorney General shall give great weight to any recommendations of the independent counsel.
>
> (B) If the Attorney General determines, after according great weight to the recommendations of the independent counsel, that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court and the division of the court shall have no power to expand the jurisdiction of the independent counsel or to appoint another independent counsel with respect to the matters involved.
>
> (C) If –
>
> (i) the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted; or

> (ii) the 30-day period referred to in subparagraph (A) elapses without a notification to the division of the court that no further investigation is warranted, the division of the court shall expand the jurisdiction of the appropriate independent counsel to include the matters involved or shall appoint another independent counsel to investigate such matters.

28 U.S.C. § 593(c) (1994).

Finally, this case involves § 455(a) of Title 28, which provides:

> **§ 455. Disqualification of justice, judge, or magistrate**
>
> **(a)** Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a) (1994).

STATEMENT OF THE CASE

I. The Appointment of Kenneth W. Starr as Independent Counsel and the Subject Matter of the Office of Independent Counsel's Jurisdiction

On July 1, 1994, Attorney General Janet Reno filed a request for the appointment of an independent counsel with the Division of the Court for the Purpose of Appointing Independent Counsels ("Special Division"). (App. 86-92). On August 5, 1994, in response to and consistent with the Attorney General's request, the Special Division issued an order appointing Kenneth W. Starr, Esq. as Independent Counsel and conferred on Mr. Starr and his office (hereinafter "Office of the Independent Counsel" or "OIC") investigative and prosecutorial jurisdiction over the following subject matter:

> [W]hether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's or Mrs. Hillary

> Rodham Clinton's relationship with Madison Guarantee Savings and Loan Assn, Whitewater Development Corp., or Capital Management Services, Inc. . . .

(App. 74-75, 91-92).[1]

Accordingly, by the express terms of the Special Division's appointing order, the OIC's prosecutorial jurisdiction is limited to cases relating to a *specific subject matter*: the

---

[1] The Special Division's August 5, 1994, Order also provides:

> The Independent Counsel shall have jurisdiction and authority to investigate other allegations for evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.
>
> The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

(App. 75).

These two provisions are not at issue here because it is undisputed that the instant case does not involve any attempts to obstruct the OIC's investigation. The language of these two paragraphs only provides the OIC with ancillary jurisdiction to investigate and prosecute attempts to obstruct the OIC's investigation. See 28 U.S.C. § 593(b)(3) (1994) (authorizing Special Division to confer investigative and prosecutorial jurisdiction on an independent counsel to investigate crimes related to the subject matter of Attorney General's request, and criminal attempts to obstruct the independent counsel's investigation, but nothing further); *United States v. Secord*, 725 F. Supp. 563, 564-65 & n.4 (D.D.C. 1989) (holding that the language of a Special Division order conferring jurisdiction on an independent counsel to investigate and prosecute alleged crimes "developed during the [i]ndependent [c]ounsel's investigation and connected with or arising out of that investigation" is intended to confer jurisdiction on an independent counsel to investigate and prosecute attempts to obstruct the independent counsel's investigation).

relationship of three particular individuals – James McDougal, President Clinton, or Mrs. Clinton – to three specific business entities – Madison Guarantee Savings & Loan Association ("Madison Guarantee"), Whitewater Development Corporation ("Whitewater Development"), or Capital Management Services, Inc. ("CMS").

II. The Instant Indictment and its Lack of Connection to the Subject Matter of the Independent Counsel's Jurisdiction

On June 7, 1995, the OIC filed a three-count indictment in the United States District Court for the Eastern District of Arkansas, the Honorable Henry Woods presiding. Count 1 charges defendants Jim Guy Tucker and William J. Marks, Sr., petitioner herein, with conspiring to make a false statement to CMS, in violation of 18 U.S.C. § 371. Count 2 charges Mr. Tucker and Mr. Marks with making a false statement to CMS, in violation of 18 U.S.C. § 1014. Both counts relate to a $300,000 loan allegedly obtained by Mr. Tucker and Mr. Marks in June 1987 from CMS. Briefly stated, Counts 1 and 2 allege that Mr. Tucker and Mr. Marks represented to CMS that the proceeds of the $300,000 loan would be for the benefit of D&L Communications, Inc., a small cable television company in Florida. Instead, according to the indictment, Mr. Tucker and Mr. Marks used the proceeds of the $300,000 loan as collateral for an $8.5 million loan from Fleet National Bank in Providence, Rhode Island and State Street Bank & Trust Company in Boston, Massachusetts (collectively "Fleet"). The $8.5 million Fleet loan allegedly was used to finance Mr. Tucker and Mr. Marks' cable television venture in Florida and Texas.

It is undisputed that no connection exists between the allegations in Counts 1 and 2 and the relationship of James McDougal, President Clinton, or Mrs. Clinton to Madison Guarantee, Whitewater Development, or CMS. Although the allegations in Counts 1 and 2 do involve the relationship of Mr. Tucker and Mr. Marks to CMS, they are in no way related to the relationship of Mr. McDougal, President Clinton, or

Mrs. Clinton to CMS (or, for that matter, Madison Guarantee or Whitewater Development).

Count 3 charges Mr. Tucker, Mr. Marks, and John Haley, Mr. Tucker's former attorney, with conspiring to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service. Count 3 alleges that Mr. Tucker, Mr. Marks, and Mr. Haley conspired to file a "sham" bankruptcy proceeding in the Northern District of Texas styled *In re: Landowners Management Systems, Inc.* (hereinafter "the LMI bankruptcy") for the purpose of obtaining a more favorable tax treatment for Mr. Tucker when he would later sell a cable television system. Landowners Management, Inc. was a Texas corporation whose principal asset was a cable system located in Plantation, Florida. It is undisputed that the allegations in Count 3, like the allegations in Counts 1 and 2, have nothing to do with Mr. McDougal, President Clinton, or Mrs. Clinton, let alone the relationship of any of these individuals to Madison Guarantee, Whitewater Development, or CMS.

III. The Defendants' Motions to Dismiss, the OIC's Concession That No Factual Relationship Exists Between the Instant Case and the Subject Matter of the OIC's Jurisdiction, and the District Court's Ruling

Each of the defendants moved to dismiss the indictment on the ground that, because the allegations in the instant case are entirely unrelated to the subject matter which the OIC was appointed to investigate and prosecute, the OIC had no jurisdiction to prosecute the case. In its responsive brief to the district court, the OIC conceded that "the facts do not link Defendants to a specific relationship among CMS, the Clintons, or James B. McDougal." (App. 56). The OIC offered only two asserted facts to support its contention that the instant case is within its investigative and prosecutorial jurisdiction: (1) the fact that the case involves CMS, and (2) the fact that his predecessor's staff learned of the events alleged in the indictment from a witness while investigating CMS. (App. 63). The OIC did not assert any additional facts to

support jurisdiction, nor did it request an evidentiary hearing to establish any additional factual basis for jurisdiction.

Instead, the OIC relied on its position that a September 2, 1994, letter from the Office of the Assistant Attorney General for the Criminal Division to the OIC "conclusively" established the OIC's legal authority to prosecute the instant case. That document provides in pertinent part:

> Dear Mr. Starr:
>
> The Attorney General has received your letter of August 31, 1994 requesting that the Department of Justice refer to the Office of the Independent Counsel/Madison Guaranty Bank related matters pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that these matters are related to your investigation and that referral to your Office would be appropriate. We therefore refer investigative and prosecutorial jurisdiction over the following matters to your Office:
>
> > Whether any person committed any federal crime relating to the bankruptcy action entitled *In re Landowners Management Systems, Inc., Tax Identification No. 75-2001914, Debtor,* United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11). . . .

(App. 79-80).

On September 5, 1995, the district court issued an Order and accompanying Memorandum Opinion dismissing the indictment. (App. 51-92). The court first rejected the OIC's claim that the court had no power to review whether the OIC had legal authority to prosecute the case before the court. (App. 60). The court then held that, because the OIC could not point to any factual connection between this case and the subject matter of its prosecutorial jurisdiction – and indeed no such connection even arguably exists – the OIC had no legal authority to prosecute the case before the court. Accordingly, the court dismissed the indictment. (App. 73).

IV. The Panel's Decision

The OIC appealed to the Court of Appeals for the Eighth Circuit. On March 15, 1996, a panel of the Eighth Circuit issued an opinion reversing the district court's dismissal of the indictment. (App. 1-29). The panel first held that the Attorney General's referral of the matter pursuant to § 594(e) conclusively established the OIC's investigative and prosecutorial jurisdiction in the case, which the district court had no power to review. (App. 5-13). The panel's holding effectively means that an independent counsel may prosecute any alleged crime in this country, notwithstanding the lack of any legal authority to do so, simply because the Attorney General has summarily agreed that the independent counsel may do so. *See infra* p. 12 & n.4.

The panel then held that, even assuming *arguendo* the OIC's prosecutorial authority is reviewable, the instant case is "related" to the OIC's jurisdiction as that term is used in § 594(e). (App. 13-21). The court specifically rejected the defendants' contention that, to be "related" under § 594(e), a matter must be *factually* related to the subject matter of an independent counsel's jurisdiction. (App. 17-18). Instead, the panel held that "relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." (App. 18). Purporting to apply that standard to the case before it, the court found that the instant case is related to the OIC's prosecutorial jurisdiction under § 594(e) merely because it involves an "overlap in witnesses and defendants" with another case (the *McDougal* case[2]) which the OIC is prosecuting. Significantly, the panel did not point to a single *factual* connection between the instant case and the subject matter of the OIC's jurisdiction to support its conclusion that the case is related to the OIC's jurisdiction under § 594(e). Instead, the panel held that

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[2] *United States v. James B. McDougal, Jim Guy Tucker, and Susan H. McDougal,* No. LR-CR-95-173 (E.D. Ark.) (filed August 17, 1995).

administrative convenience is all that is necessary for a matter to be related under § 594(e). *See infra* at pp. 19-21.

The panel also ordered the disqualification of Judge Woods, on remand, based on its conclusion that under 28 U.S.C. § 455(a) his "impartiality might reasonably be questioned." (App. 22-28). The panel did so notwithstanding that the OIC sought disqualification for the first time on appeal, the factual basis for the disqualification request was known to the OIC at the district court level well before Judge Woods issued his September 5, 1995, order dismissing the indictment, the factual basis for the OIC's request consisted entirely of non-record newspaper and magazine articles, and such articles suggest, at most, that Judge Woods is a friend and admirer of Mrs. Clinton (who, it bears emphasis, is not a party to this lawsuit nor in any way involved in it).

V. The Dissent to Denial of Rehearing En Banc

Each of the defendants timely filed requests for rehearing and suggestions for rehearing *en banc*. On May 6, 1996, the panel denied the defendants' requests for rehearing, and the entire court of appeals, three judges dissenting, denied the defendants' suggestions for rehearing *en banc*. Two of the dissenting judges concluded that the panel had committed "fundamental error" in holding that "the judiciary lacks jurisdiction to review the scope of the authority of the special prosecutor." (App. 31 n.1). All three dissenting judges[3] disagreed with the panel's order of reassignment, stating *inter alia:*

> Judge Woods is one of this circuit's most experienced and respected trial judges. He has served his community, his state, and his nation with distinction

---

[3] The dissenting judges also took the highly unusual action of noting that Senior Judge Gerald W. Heaney (who because of his senior status could not participate in the *en banc* rehearing vote) had authorized the dissenting judges "to state that if he were permitted, he would vote to grant the petition for rehearing *en banc* with respect to the disqualification issue." (App. 49).

> for more than fifty-six years. For a panel of this court to disqualify Judge Woods "to preserve the appearance of impartiality" is a disservice to the federal judiciary. To do so on the basis of newspaper and magazine articles and without the issue having been raised in district court, giving Judge Woods an opportunity to respond, compounds the indignity.
>
> . . . .
>
> . . . [B]eing a friend of a friend is not in itself a proper or adequate basis for disqualification. This court has never before based a decision on guilt by association, and now is not the time to start. If this principle is rejected, what becomes clear is that this case was not the result of established norms and procedures, but of special considerations and concerns. Given the highly political nature of this case and the necessity of the court to rule on the merits of the underlying litigation, the departure from common practice regarding the disqualification of a district judge leaves this court open to the charge of politicization.

(App. 31, 49).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Nonreviewability Holding *(a)* Judicially Repeals the Limitation on § 594(e) Referrals Expressly Imposed by Congress, *(b)* Conflicts with the Well-Established Principle That Affirmative Executive Actions Are Presumptively Reviewable for Lawfulness, *(c)* Encourages the Unauthorized Expansion of the Scope of Independent Counsel Offices Beyond the Limited Purposes for Which They Were Created, and *(d)* Allows an Executive Branch Official – the Attorney General – to Handpick Which Person Is to Serve as Special Prosecutor for a Matter.

By its express terms, § 594(e) authorizes the Attorney General to refer, and an independent counsel to accept, a matter for investigation and prosecution *only* if it "relates to

the independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 594(e) (1994). The court of appeals' holding that the legal validity of such a referral is not reviewable by any court – even the very court before whom the independent counsel is attempting to prosecute the matter at issue – judicially repeals the limitation Congress expressly imposed on § 594(e) referrals. If allowed to stand, the court of appeals' holding would effectively mean that an independent counsel could prosecute any alleged crime in this country, notwithstanding the lack of any legal authority to do so, simply because the Attorney General has agreed that the independent counsel may do so. Under this holding, for example, the Attorney General could have summarily referred to the instant OIC (and the OIC could have summarily accepted) the prosecution of the Waco Branch Davidians, and the courts would have been powerless to review the OIC's legal authority to prosecute that case.[4]

The panel's holding is contrary to well-established legal principles concerning the reviewability of executive action. In *Heckler v. Chaney*, 470 U.S. 821 (1985), this Court discussed at length the standards governing the reviewability of executive actions. The Court specifically addressed the difference between the reviewability of an affirmative action by an executive official as opposed to the reviewability of the refusal of an executive official to act:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

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[4] The OIC admitted during oral argument at the court of appeals that it was indeed its position that, if the Attorney General had referred the Waco Branch Davidian prosecution to the OIC pursuant to § 594(e), the OIC's legal authority to prosecute the case would not be subject to judicial review.

Id. at 832 (emphasis original). Whereas an executive official's failure to act is presumptively nonreviewable, an affirmative executive act is presumptively reviewable. *Id.* at 827-35.

Under *Heckler,* only two circumstances can exist to overcome the strong presumption of reviewability of affirmative executive actions: (1) when "the statute precludes reviewability" or, (2) when "no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Id.* at 828. Neither of these exceptions exist to overcome the strong presumption that a referral under § 594(e) is subject to judicial review.

First, nowhere in the Independent Counsel Act has Congress indicated that Attorney General referrals under § 594(e) are not subject to judicial review. Although Congress has expressly provided that Attorney General decisions to seek the appointment of an independent counsel "shall not be reviewable in any court," 28 U.S.C. § 592(f) (1994), Congress has expressed no similar limitation with respect to the judicial reviewability of Attorney General referrals under § 594(e).

The panel's conclusion that the presumption of unreviewability is overcome in the case of Attorney General referrals under § 594(e) was based entirely on a single sentence from a congressional staff report stating that "the conferees did not want to suggest that, by indicating a lack of judicial review of Attorney General decisions on preliminary investigations, that review might be available of other Attorney General decisions under the [Act]." (App. at 8-9) (quoting H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987), reprinted in 1987 U.S.C.C.A.N. 2185, 2188). That sentence, however, simply acknowledges the conferees' agreement with the holdings of *Dellums v. Smith,* 797 F.2d 817 (9th Cir. 1986), and *Banzhaf v. Smith,* 737 F.2d 1167 (D.C. Cir. 1984) (*en banc*). Both of those cases involved the reviewability of a challenge by members of the public to an Attorney General decision *not* to take action under the Act. *Dellums,* 797 F.2d at 823 (holding that Congress intended to preclude judicial review, at the behest of members of the public, of an Attorney General decision not to conduct a

preliminary investigation); *Banzhaf*, 737 F.2d at 1168 (holding that Congress intended to preclude judicial review, at the behest of members of the public, of an Attorney General decision not to seek the appointment of an independent counsel). The challenges at issue in *Dellums* and *Banzhaf* are hardly the equivalent of challenges by defendants in a federal criminal action to the lawfulness of an affirmative executive act (a prosecution) that directly affects the rights of those defendants. In any event, the panel's conclusion that the language at issue is enough to overcome the strong presumption of reviewability constitutes an unwarranted elevation of legislative history to the level of statutory language. *See Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S.Ct. 637, 645-47 (1996) (Scalia, J., concurring) (discussing relevance of legislative history to statutory construction analysis).

When the issue is, as here, whether an executive official has the legal authority to prosecute a matter before the very court deciding the question of reviewability, an even greater, perhaps irrebuttable, presumption of judicial reviewability should apply than in other situations involving affirmative executive action. Even if it could fairly be said that Congress *intended* to require a federal district court judge to sit idly by while a member of the executive branch commits an unauthorized act (*i.e.*, a prosecution not authorized by law) in the judge's very presence, it would pose substantial separation of powers concerns to allow such congressional intent to be effectuated.

Second, it cannot be said that no judicially manageable standard is available for judging whether the Attorney General exceeded her statutory authority in referring to the OIC, and the OIC exceeded its statutory authority in accepting, the matter at issue. The standard for determining whether the Attorney General had authority to refer this case to the OIC, and the OIC had authority to accept the case for prosecution, is the "relatedness" standard expressly set forth in § 594(e) itself. It is no more difficult for the courts to apply the relatedness standard of § 594(e) in particular cases than it is for the courts to apply standards such as negligence or good

faith in particular cases. An illustration is *United States v. Secord*, 725 F. Supp. 563 (D.D.C. 1989), where the court expressly ruled on whether a particular matter was "related to" the subject matter of an independent counsel's jurisdiction.[5] More recently, the Special Division expressly ruled on whether a matter was related to an independent counsel's jurisdiction under § 594(e) – the very statutory provision at issue here. *In re Espy*, 80 F.3d 501, 508-09 (D.C. Cir. 1996). Indeed, the fact that Congress has expressly provided for relatedness determinations under § 594(e) by a judicial body (the Special Division) belies the idea that courts are incapable of making such determinations. 28 U.S.C. § 594(e) (1994) (providing that a matter may be referred by the Special Division to an independent counsel if such matter "relates to the independent counsel's prosecutorial jurisdiction"). The panel's "alternative" holding in the instant case, in which it purported to review the Attorney Generals' relatedness determination under § 594(e), also contradicts any suggestion that no "judicially manageable" standard is available for reviewing § 594(e) relatedness determinations by the Attorney General.

Decisions by the Attorney General to refer matters to independent counsels under § 594(e) are not analogous to decisions by the Attorney General concerning which subordinate officers within the Department of Justice should prosecute particular cases. In setting forth the Attorney General's authority to refer matters for prosecution to subordinate members of the Department of Justice, Congress has used sweeping language which leaves no doubt that the Attorney General has virtually unlimited discretion in choosing which prosecutors within the Department of Justice are to prosecute particular cases. Moreover, in defining this authority Congress has

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[5] The *Secord* decision involved a judicial application of the relatedness standard of § 593(b)(3) of the Act as opposed to the relatedness standard of § 594(e). The case demonstrates, however, that the courts are fully capable under the Act of applying its relationship standards to facts asserted by an independent counsel as supporting jurisdiction.

used broad language that, without question, provides no judicially manageable standard for reviewing such decisions. *See, e.g.*, 18 U.S.C. § 516 (1994) (conduct of litigation in which United States is a party is reserved to officers of Department of Justice "under the direction of the Attorney General"); 18 U.S.C. § 518(b) (1994) (Attorney General may delegate prosecution of cases to the Solicitor General or a particular officer in the Department of Justice when "the Attorney General considers it in the interests of the United States").

In contrast, Congress has used *limiting* language in defining the Attorney General's authority to refer a matter for prosecution to an independent counsel. Congress has not, for example, given the Attorney General authority to refer a matter to an independent counsel when "the Attorney General considers it in the interests of the United States." Instead, Congress has provided that the Attorney General may refer a matter to an independent counsel, but only when it is "*related to* the independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 594(e) (emphasis supplied).

It bears emphasis that this petition does not present the issue of whether the Attorney General acted unwisely, unfairly, or otherwise abused her discretion in referring a matter to the OIC which Congress has authorized her to refer (*i.e.*, a matter *related to* the OIC's jurisdiction). It is thus distinguishable from the "prosecutorial discretion" cases cited by the panel in support of its nonreviewability holding. *See* App. at 7 (citing, *inter alia, Wayte v. United States*, 470 U.S. 598, 608 (1985)). Rather, the instant petition presents the issue of whether the Attorney General acted altogether outside her decision-making authority in referring, and OIC acted altogether outside its statutory decision-making authority in accepting, a matter that is *unrelated* to the OIC's jurisdiction. Accordingly, that issue is reviewable by the courts, and the panel erred in holding otherwise. *See Gutierrez de Martinez v. Lamagno*, 115 S.Ct. 2227 (1995) (Attorney General's "scope of employment" certifications under Westfall Act are subject to judicial review for their legal validity).

The panel's nonreviewability holding raises important national policy concerns that go far beyond the effect the

holding will have on the parties in the instant case. If allowed to stand, the panel's holding would effectively mean that a member of the Executive Branch – the Attorney General – has the unilateral power to select which person is to serve as "special prosecutor" with respect to particular allegations of misconduct. *See infra* pp. 22-23 (panel's "administrative convenience" interpretation of § 594(e) eliminates Special Division's involvement in selection of independent counsels). One need only recall the infamous "Saturday Night Massacre" to appreciate the loss of confidence in our political system that will ensue if such an interpretation of the Independent Counsel Act is allowed to stand.[6]

Dissenting in *Morrison v. Olson*, 487 U.S. 654 (1988), Justice Scalia discussed the dangers of the possession of unchecked power by independent counsels:

> Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated, and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors "pick people that [they] thin[k they] should get, rather than cases that need to be prosecuted," if they amass many more resources against

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[6] The Saturday Night Massacre was the genesis of the Independent Counsel Act. On that day in 1973, President Nixon ordered Watergate Special Prosecutor Archibald Cox fired after he attempted to subpoena tapes of presidential conversations. The resulting public and professional outcry resulted in the enactment of the Independent Counsel Act in an attempt to end executive branch control over the selection and appointment of special prosecutors. *See In re Olson*, 818 F.2d 34, 41-42 (D.C. Cir. 1987) (discussing events giving rise to Independent Counsel Act). The panel's nonreviewability holding subverts that intent.

> a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office. I leave it to the reader to recall the examples of this in recent years.

Id. at 731 (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940). Nothing has occurred since *Morrison* that changes this observation. As one commentator recently stated: "Special prosecutors in the United States aren't special anymore. . . . They are routine, roving commissions, looking for dirt on our leaders and anyone with the misfortune, as it often turns out, to have known them."[7]

In *Morrison,* a majority of this Court held that the Independent Counsel Act is, on its face, constitutional. Nonetheless, the majority emphasized that independent counsels have *no* authority to engage in actions which the Act does not authorize them to take. 457 U.S. at 672. The instant case illustrates the increasing tendency of independent counsel offices to expand their scope far beyond the limited purposes for which they were created.[8] The lower court's

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[7] Professor Susan Estrich, University of Southern California School of Law, USA Today, p. 9a, July 6, 1995.

[8] The jurisdiction of the instant OIC, for example, was recently expanded by the Special Division to include the White House travel office firings, a matter obviously unrelated to the OIC's original jurisdiction. *In re Watkins,* Special Division Order filed March 22, 1996. Because that expansion ostensibly was made pursuant to 28 U.S.C. § 593(c), as opposed to 28 U.S.C. § 594(e), the expansion appears to be lawful. Nonetheless, it is difficult to imagine a matter further afield from the original subject matter of the OIC's jurisdiction (which relates to three particular individuals' involvement in the mid-1980's "Whitewater" matter in Arkansas) than the 1993 White House travel office firings. The fact that the OIC's jurisdiction has been expanded to include the travel office firings illustrates that, all too often, virtually uncontrollable political and bureaucratic forces come into

nonreviewability ruling not only encourages such expansion, it encourages its *unauthorized* expansion.

We respectfully urge the Court to grant certiorari to overturn the panel's nonreviewability ruling. Independent counsel cases, by definition, concern matters of national importance. Justice Scalia has already spoken at length of the dangers to our political system that exist when independent counsel offices operate *within* their jurisdictional bounds as set by Congress and the Special Division. *Morrison,* 487 U.S. at 697-734. These dangers are exacerbated – and wholly unjustified under the law – when independent counsel offices are allowed, as here, to clearly exceed their jurisdictional limits.

II. The Court of Appeals' Adoption of an "Administrative Convenience" Standard for Evaluating Attorney General Referrals under § 594(e) Allows the Attorney General and an Independent Counsel Office to Circumvent the Act's Expansion Provisions as Expressly Set Forth in § 593(c).

The panel held that "relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." (App. 18). The panel then held that the instant case satisfies this confusing standard – and therefore the case is related to the OIC's jurisdiction under § 594(e) – because an "overlap" exists between the instant case and another case which the OIC is prosecuting – the *McDougal* case.[9] The panel noted that both cases involve:

(1) common witnesses;

(2) a common defendant (Jim Guy Tucker);

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play which have the effect of turning independent counsel offices into permanent hall monitors of the Presidency. The lower court's ruling in this case only encourages this phenomenon.

[9] *See supra* note 2.

(3) alleged material false statements to CMS;[10] and

(4) a relationship between Tucker and CMS.

(App. 19).

Although the abstract § 594(e) "relationship" standard articulated by the panel purports to require consideration of a "*factual link*" between the OIC's original prosecutorial jurisdiction and the matter sought to be referred, the panel's application of that standard to the case before it demonstrates that, in the panel's view, no factual connection is actually required. Significantly, the panel did not identify any connection whatsoever between the *facts* at issue in the instant case and the *factual subject matter* of the OIC's jurisdiction. It bears particular emphasis that the mere fact that the instant case involves a "Tucker relationship with CMS" (item (4) above) does not mean the case is related to the subject matter of the OIC's jurisdiction. That subject matter is, again, the relationship of *James McDougal, President Clinton, or Mrs. Clinton* to Madison Guaranty, Whitewater Development, or CMS – not the relationship of *Jim Guy Tucker* to one or more of these entities.

Indeed, the panel expressly rejected the defendants' contention that, to be related under § 594(e), a *factual connection* must exist between the matter sought to be referred and the subject matter of the OIC's jurisdiction. (App. 18). Instead, the panel's application of its enunciated standard to the case before it demonstrates that it in fact held that *administrative convenience* is all that is necessary for a matter to be properly referred by the Attorney General to an independent counsel under § 594(e). In other words, according to the panel, under § 594(e) the Attorney General may properly refer, and the OIC may properly accept, the prosecution of *any* federal criminal case in this country so long as an argument can be

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[10] It is undisputed that the alleged false statements made to CMS in *McDougal* are entirely separate and distinct from the alleged false statements to CMS in the instant case; they are in no way connected with each other.

made that it is administratively convenient for the OIC to prosecute the case as opposed to the Department of Justice.

This interpretation of § 594(e) conflicts directly with Congress' expressed intent in enacting the Independent Counsel Act. A referral under § 594(e) is a *summary* procedure. It was intended simply to be a housekeeping device whereby the Department of Justice and an independent counsel office can confirm, with each other, that both believe a specific matter is within the independent counsel office's jurisdictional grant as defined by the Special Division, and therefore the matter will be prosecuted by the independent counsel office as opposed to the Department of Justice.[11] The Special Division recently reached this very conclusion with respect to § 594(e) referrals by that body. *In re Espy,* 80 F.3d 501, 508-09 (D.C. Cir. 1996) (holding that, for a matter to be properly referred by the Division to an independent counsel office pursuant to § 594(e), the matter must be "demonstrably related to the factual circumstances underlying the Attorney General's original investigation and request for appointment of an independent counsel"). The limited purpose of § 594(e), according to the Special Division, is to make "explicit" that an independent counsel office has jurisdiction over a matter that "was implicitly included in the original grant of prosecutorial jurisdiction." *Id.* at 507. In other words, § 594(e) is merely a device to *confirm* that a matter is within the independent counsel office's jurisdiction " 'as already defined' " – not a

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[11] The original Senate Report accompanying § 594(e) provides in pertinent part:

> [T]he special prosecutor may conclude that it is necessary to handle a criminal investigation *which the special prosecutor has been assigned* in connection with other ongoing criminal investigations being handled by the Department of Justice. Therefore, i[t] is particularly appropriate that the special prosecutor have the authority to ask the Attorney General or the special division of the court to assign related matters to the special prosecutor. . . .

S. Rep. No. 170, 95th Cong., 1st Sess. at 69, 1978 U.S.C.C.A.N. at 4285 (emphasis supplied).

device to confer jurisdiction over a matter not already within the independent counsel's original jurisdictional grant from the Special Division. *Id.* at 506-07 (quoting *Morrison*, 487 U.S. at 680 n.18).[12]

Section 594(e) was not intended to create a new substantive area of independent counsel jurisdiction. This is demonstrated beyond doubt by the expansion provision set forth in § 593(c). Under that provision, an independent counsel's jurisdiction may be expanded to a new matter, but only after *(1)* the Attorney General has determined that the matter involves alleged misconduct by the statutorily-defined category of high-ranking federal officials or other persons who are in a position to exert improper influence over officers of the Department of Justice, 28 U.S.C. §§ 591(b)-(c); 593(c)(2); *(2)* the Attorney General has conducted a preliminary examination of the facts involved in the new matter and determined that there are reasonable grounds to believe that further investigation is warranted, 28 U.S.C. §§ 592(a)(1), 593(c)(2); *(3)* the Attorney General has requested that an independent counsel be appointed to investigate and prosecute the matter or that the matter be referred to an existing independent counsel, 28 U.S.C. §§ 592(c)(1), 593(c)(2); and *(4)* the Special Division decides to refer the new matter to the existing independent counsel as opposed to appointing a new independent counsel or referring the matter to another existing independent counsel, 28 U.S.C. § 593(b), 593(c)(2). All of these procedures are sidestepped when, as here, the Attorney General summarily refers a matter to an existing independent counsel pursuant to § 594(e).

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[12] Footnote 18 to *Morrison* reads in its entirety as follows:

> In our view, [§ 594(e)] does not empower the [Special Division] to expand the original scope of the counsel's jurisdiction; that may be done only upon request of the Attorney General pursuant to § 593(c)(2). At most, § 594(e) authorizes the court simply to refer matters that are "relate[d] to the independent counsel's jurisdiction, *as already defined.*" *Morrison v. Olson*, 487 U.S. 654, 680 n.18 (1988) (emphasis supplied).

Simply put, the "administrative convenience" standard adopted by the panel for referrals by the Attorney General under § 594(e), if allowed to stand, is so broad that it would allow the Department of Justice and an independent counsel office to expand the latter's jurisdiction to virtually any new case – without either office troubling themselves with the substantive and procedural requirements for expansion which Congress has expressly mandated in § 593(c). Under the panel's standard, it would be difficult to ever say that it was not reasonable for the Attorney General and an independent counsel office to conclude that it was "administratively convenient" to allow the independent counsel office to prosecute a case instead of the Department of Justice. And this is true no matter how far removed the case is from the original matters which the independent counsel office was created to investigate and prosecute.

The expansion provision of § 593(c) is not statutory boilerplate. As is the Act's provision for the appointment of an independent counsel in the first instance, the Act's expansion provision is a carefully-constructed system of substantive and procedural safeguards designed to ensure that a matter is investigated and prosecuted by an independent counsel when doing so will serve the underlying purposes of the Act, *but not otherwise*. Under both provisions, for example, the Attorney General must make an explicit determination that the matter at issue involves a person who is in a position to exert improper influence over Department of Justice prosecutors. (Otherwise, no need exists for the matter to be prosecuted by an independent counsel). Both provisions also require the participation of the Special Division, which selects the particular independent counsel who will investigate and prosecute the matter at issue and which defines that counsel's precise jurisdiction. Congress' decision to vest the latter powers in the independent judiciary, as opposed to the Attorney General, goes to the very heart of the Act's purpose – to remove from the Executive Branch (including the Attorney General) the power to select which person is to serve as a "special prosecutor" with respect to a matter. *See Morrison*, 497 U.S. at 677 (discussing Congress' purpose in vesting

power to select independent counsels in independent judiciary). The "administrative convenience" standard adopted by the lower court allows the Attorney General to unilaterally circumvent these safeguards.

This Court held in *Morrison* that the Independent Counsel Act does not facially violate the Appointments Clause. Nonetheless, according to the Court, the Clause mandates that

> an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division, pursuant to a request by the Attorney General.

Morrison, 487 U.S. at 672. In other words, an independent counsel who acts outside his or her jurisdiction is acting as a "superior officer" and therefore in violation of, *inter alia*, the Appointments Clause. Although *Morrison* specifically concerned whether the Independent Counsel Act allows the Special Division to create a superior officer in violation of the Appointments Clause, *Morrison's* rationale applies equally to an attempt by the Attorney General to treat the independent counsel as a superior officer. In this regard, once a matter has been referred by the Attorney General to an independent counsel under § 594(e), the Attorney General loses all supervisory control over the investigation and prosecution of that matter. 28 U.S.C. §§ 594(i) (independent counsels are "separate from and independent of the Department of Justice"); 597(a) (once matter is referred by Attorney General to an independent counsel pursuant to § 594(e), "the Department of Justice shall suspend all investigations and proceedings regarding such matter . . . except insofar as such independent counsel agrees in writing that such investigation and proceedings may be continued by the Department of Justice").

Under the Appointments Clause, a superior officer may be created only by the President with the advice and consent of the Senate. The Attorney General has no more authority to treat the OIC as a superior officer than does the Special Division. Accordingly, the Special Division's conclusion that a matter must be "demonstrably related to the *factual circumstances* underlying the Attorney General's original investigation and request for appointment of an independent counsel"

should apply both to referrals by the Special Division and referrals by the Attorney General.[13]

The "administrative convenience" standard adopted by the panel, if allowed to stand, will implicate the same fundamental policy concerns as will the panel's nonreviewability holding if allowed to stand. *See supra* pp. 16-19. We therefore urge the Court to grant certiorari to overturn both holdings.

III. The Court of Appeals' Action in Ordering Judge Woods Disqualified under 28 U.S.C. § 455(a), Based Entirely on Newspaper and Magazine Articles and Notwithstanding the OIC's Knowing Failure to Raise the Disqualification Issue at the District Court Level, Conflicts Directly with the Rulings of Every Other Circuit Court to Consider the Issue.

The panel's order disqualifying Judge Woods from further proceedings in this case came in response to the OIC's request, which it raised for the first time in its appellate brief, that Judge Woods should be disqualified because "a reasonable person would question his impartiality." The panel granted the OIC's request notwithstanding the following undisputed facts:

> (1) At no time in the district court did the OIC request, or even hint for that matter, that Judge Woods recuse himself;
>
> (2) the newspaper and magazine articles upon which the OIC sought disqualification, and which the panel relied upon to disqualify Judge Woods,

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[13] In *dictum*, the Special Division stated that, because a referral of a matter by the Attorney General to an independent counsel does not implicate separation of powers concerns, the standard for relationship under § 594(e) "is arguably broader when the referral comes from the Attorney General as opposed to the Special Division." *Id.* at 507. Nothing in the language of § 594(e) or its legislative history, however, suggests that Congress intended that two different standards for relationship should exist within this single statutory provision. Moreover, the Special Division's *dictum* fails to consider, *inter alia*, this Court's Appointments Clause analysis in *Morrison*.

were in the public domain and known to the OIC well before Judge Woods' September 5, 1995, ruling;

(3) the OIC stated in its appellate brief that "*[e]ven before Judge Woods issued his opinion dismissing the indictment,* a reasonable person would have questioned his impartiality in any matter involving this Independent Counsel," thus conceding that the OIC was well aware of its asserted basis for seeking disqualification prior to Judge Woods' ruling; and

(4) the OIC made no attempt in the district court to develop any form of evidentiary record upon which an appellate court could properly review the issue of whether Judge Woods should be disqualified, thus, *inter alia,* depriving Judge Woods of the opportunity to respond to the OIC's charges of bias.

The panel stated that its statutory basis for ordering disqualification was 28 U.S.C. § 2106, which provides that the appellate courts have authority to "require such further proceedings to be had as may be just under the circumstances." (App. 24). The panel further held, however, that its underlying legal basis for ordering Judge Woods disqualified was 28 U.S.C. § 455(a). (App. 26).

Section 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The panel's conclusion that Judge Woods' impartiality might reasonably be questioned was based solely on newspaper and magazine articles which the OIC provided to the panel pursuant to its request *sua sponte* that the record be supplemented on appeal. (App. 41). According to the panel, the articles demonstrate that Judge Woods is a friend and admirer of Mrs. Clinton. Based on this relationship, and the fact that President Clinton and Jim Guy Tucker are both members of the Democratic Party, the panel concluded that "a public perception" exists that Judge Woods, who was appointed in 1980 by President Carter, is biased in favor of Mr. Tucker and against the OIC. (App. 27).

The panel's interpretation and application of § 455(a) is unprecedented. First, the court's order is based on a factual finding – ostensibly that Judge Woods is a "friend of a friend" of a party to this lawsuit – that previously has been unrecognized as a basis for disqualifying a judge under § 455(a). *See* Dissenting Opinion to Denial of Rehearing *En Banc* (App. 48). Second, the evidentiary basis upon which the panel reached this factual finding – non-record newspaper and magazine articles which contain unverified hearsay and which were not brought to the attention of the district court – constitutes a wholesale departure from accepted techniques for receiving and evaluating evidence related to the disqualification of district court judges. *See id.* (App. 40-43).

The most egregious aspect of the panel's holding, however, is its legal conclusion that, unlike disqualification under § 455(b), there is *no timeliness requirement* for requests for disqualification under § 455(a). The panel reached this conclusion of law notwithstanding that almost every other court to consider the issue has held that a timeliness requirement exists for recusal requests under § 455(a). *E.g., United States v. Brinkworth,* 68 F.3d 633, 639 (2d Cir. 1995) ("[a] timeliness provision has been judicially implied [in § 455(a) cases]"); *Travelers Ins. Co. v. Liljeberg,* 38 F.3d 1404, 1410 (5th Cir. 1994) ("Our court has recognized that a timeliness requirement applies to raising a § 455(a) disqualification"); *The El Fenix v. M/Y Johanny,* 36 F.3d 136, 141 (1st Cir. 1994) (a recusal request under 455(a) is untimely where movant knows the facts suggesting bias beforehand); *In re Anwiler,* 958 F.2d 925 (9th Cir.) ("[a]lthough section 455(a) contains no express time limit, . . . there is a timeliness requirement inherent in the section"), *cert. denied,* 506 U.S. 882 (1992); *Polaroid Corp. v. Eastman Kodak Co.,* 867 F.2d 1415, 1420-21 (Fed. Cir. 1989) ("there is no difference between §§ 455 (a) and (b) with respect to timeliness"), *cert. denied,* 490 U.S. 1947 (1989); *Parker v. Conners Steel Co.,* 855 F.2d 1510, 1526 (11th Cir. 1988) ("[m]ost courts hold that a section 455(a) embodies a timeliness requirement in order to prevent counsel from withholding facts which support a § 455(a) recusal and then raising the recusal issue only after

receiving an adverse ruling on the merits"), *cert. denied*, 490 U.S. 1066 (1989); *Willner v. University of Kansas*, 848 F.2d 1023, 2028 (10th Cir. 1988) ("a motion to recuse under § 455(a) must be timely filed"), *cert. denied*, 488 U.S. 1031 (1989); *Scatterfield v. Edenton-Chowan Bd. of Ed.*, 530 F.2d 567, 574-75 (4th Cir. 1975) (timeliness is required in all recusal contexts).

The rationale for a timeliness requirement under § 455(a) is obvious: "Counsel, knowing facts supporting a section 455(a) recusal for appearance of partiality, may not lie in wait and raise the issue only after learning the court's ruling on the merits." *Phillips v. Amoco Oil*, 799 F.2d 1464, 1472 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

The panel's holding that no timeliness requirement exists for requests for disqualification under § 455(a) even conflicts with the Eighth Circuit's own holdings. *See, e.g., In re Apex Oil Co.*, 981 F.2d 302, 304 (8th Cir. 1992) (Judge Loken, a member of the panel in the instant case, denied recusal motion under § 455(a) in part because movant "did not raise the issue until the panel had issued its adverse decision"); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983) (request for recusal under § 455(a) untimely where request made for the first time on appeal and movant knew of grounds for request at trial court level). The panel did not even bother to attempt to distinguish these cases.

The panel did cite two cases in support of its holding – *Liteky v. United States*, 510 U.S. 540, 589-90 (1994), and *Dyas v. Lockhart*, 705 F.2d 993, 997-98 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983). Neither of those cases, however, suggest that an appellate court may order reassignment on remand where, as here, the requesting party was well aware at the district court level of the facts which it asserts suggest an appearance of bias. This Court in *Liteky* merely stated, in *dictum*, that an appellate court has authority to order reassignment on remand under some circumstances. The Court did not purport in any way to say what those circumstances are. In *Dyas*, the court of appeals in a habeas case *sua sponte* ordered reassignment on remand to a different district judge because it

had come to the court of appeals's attention that the presiding district judge, Judge Roy, had served on the state supreme court when the petitioner's direct appeal had been decided. There is no suggestion in *Dyas* that the petitioner (who was proceeding pro se) had been aware of this ground for disqualification at the federal district court level.

Dyas actually stands for precisely the opposite proposition for which it was cited by the panel below. The *Dyas* court ordered remand because the original state trial judge, Judge Steele, had been the uncle of one prosecutor, the brother of one prosecutor, and the father of another. Although Judge Steele communicated that fact to Dyas' trial attorney, and offered to recuse himself, Dyas' trial counsel refused the request. Dyas later claimed on habeas that his trial attorney failed to communicate this offer to him. The *Dyas* court therefore remanded for an evidentiary hearing to determine whether Dyas had waived the right to contest the disqualification issue. The court held:

> If Dyas knew of Judge Steele's disqualification offer and nevertheless declined to accept it, he cannot now be heard to claim that he was denied due process by Judge Steele's presiding at his criminal trial.

Dyas, 705 F.2d at 995 (citations omitted).

In conclusion, the panel's complete disregard of precedent and procedural regularity in ordering the disqualification of Judge Woods does, as the three dissenting members of the Eighth Circuit Court of Appeals stated, "leave the court [of appeals] open to the charge of politicization."[14] That charge notwithstanding, the panel's holding has created bad law. We respectfully request this Court to grant certiorari to reverse it.

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[14] All three of the members of the panel in this case, as well as all members of the Eighth Circuit who voted to uphold the panel's decision, were appointed by Republican presidents.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant William J. Marks, Sr. respectfully requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3268

United States of America,

Appellant,

v.

Jim Guy Tucker; William J. Marks, Sr.; John H. Haley,

Appellees.

United States Department of Justice; Sun Diamond Growers of California,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: December 12, 1995

Filed: March 15, 1996

Before BOWMAN, BEAM, and LOKEN, Circuit Judges.

BOWMAN, Circuit Judge.

The United States, represented by Independent Counsel Kenneth W. Starr, appeals from an order of the District Court dismissing an indictment brought against

Jim Guy Tucker, William J. Marks, Sr., and John H. Haley. The court ruled that the Office of Independent Counsel (OIC) has no jurisdiction to prosecute the case. We reverse.

On August 5, 1994, the Division for the Purpose of Appointing Independent Counsels (commonly known and herein referred to as the Special Division), pursuant to a request from United States Attorney General Janet Reno, appointed Starr as Independent Counsel

> to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, **relating in any way** to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

In re Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994) (emphasis added).[1] The order further conferred upon Starr "jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law . . . **by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.**" *Id.* at 2 (emphasis

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[1] Under 28 U.S.C. § 49 (1994), the Chief Justice appoints three judicial officers to serve two-year terms for this division of the United States Court of Appeals for the District of Columbia.

added). The OIC also was empowered to investigate any obstruction of justice "in connection with any investigation of the matters described above." *Id.* Finally, the Special Division vested in the Independent Counsel "jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters." *Id.* In sum, the court ordered that the Independent Counsel "shall have prosecutorial jurisdiction to **fully investigate and prosecute** the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and **all matters and individuals whose acts may be related to that subject matter,**" including crimes "that may arise out of the above described matter." *Id.* at 3 (emphasis added).

Starr succeeded Robert B. Fiske, Jr., who had been appointed by the Attorney General in January 1994 pursuant to 28 C.F.R. § 600.1 (1993) (after the 1987 statutes reauthorizing appointment of independent counsel had expired, and before the OIC was reauthorized again in June 1994), both in the position and in his scope of authority as Independent Counsel. Fiske had been appointed, in turn, to replace a team of lawyers from the fraud section of the criminal division of the Justice Department, which had taken over the Madison Guaranty Savings & Loan Association investigation in November 1993 when Paula Casey, United States Attorney for the Eastern District of Arkansas, recused herself and her staff

from the investigation and prosecution of matters concerning Madison Guaranty and Capital Management Services (CMS).

By letter dated September 2, 1994, the Acting Assistant Attorney General, Criminal Division, responding to Starr's August 31 request, referred to the OIC "investigative and prosecutorial jurisdiction over . . . [w]hether any person committed any federal crime relating to the bankruptcy action entitled *In Re: Landowners Management System, Inc., Tax Identification No 75-2001914, Debtor,* United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11)." The letter noted that the Attorney General had agreed that this matter, and another that was redacted from the record that is before us in this case, are related to the OIC's investigation. Letter from John C. Keeney, Acting Assistant Attorney General, Criminal Division, to Kenneth W. Starr (Sept. 2, 1994). The Independent Counsel sought referral, and the Attorney General granted it, pursuant to 28 U.S.C. § 594(e) (1994), which provides, as relevant here: "An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters." Out of what the Independent Counsel referred to during oral argument of this appeal as "an abundance of caution," the Independent Counsel in December 1994 also sought referral jurisdiction over the investigation and prosecution of federal criminal matters relating to the Landowners Management System (LMS) bankruptcy (among other matters) from the Special Division. On

December 19, the Special Division issued an Order of Referral, a paragraph of which precisely tracks the Attorney General's September 2, 1994, referral to the OIC of all investigative and prosecutorial jurisdiction over federal criminal matters relating to the LMS bankruptcy.

The OIC's criminal investigation of matters relating to the LMS bankruptcy culminated on June 7, 1995, when a grand jury for the Eastern District of Arkansas issued the indictment that is the subject of this appeal. Governor of Arkansas Jim Guy Tucker, his Little Rock lawyer John H. Haley, and his San Francisco business partner William J. Marks, Sr., were variously charged with tax fraud; bankruptcy fraud; making false material statements for the purpose of influencing CMS, a federally licensed management company in Arkansas; and conspiracy to commit various of these acts. The specifics of the indictment are discussed in further detail as necessary to the discussion in Part II of this opinion.

The case was assigned to Judge Henry Woods,[2] who on September 5, 1995, held a hearing on the defendants' motions to dismiss. Within a few hours, the court issued a twenty-one-page order and opinion dismissing the indictment on the ground that the OIC lacked prosecutorial jurisdiction over this case.

I.

The Independent Counsel's first issue on appeal was addressed by the District Court somewhat summarily and

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[2] United States District Judge for the Eastern District of Arkansas.

with little legal analysis: whether the courts have the authority to review the Attorney General's decision under 28 U.S.C. § 594(e) to refer jurisdiction to the OIC. We review this question of law *de novo* and hold that the Attorney General's exercise of her discretion to refer matters to the OIC for investigation and prosecution is not reviewable.

An independent counsel, of course, is not an ordinary United States attorney. The counsel is appointed by the judiciary (the Special Division) at the behest of the Attorney General. 28 U.S.C. §§ 593(b)(1), 592(c)(1) (1994). The scope of counsel's prosecutorial jurisdiction is delineated by the Special Division. *Id.* § 593(b)(1). Counsel may be removed only by impeachment and conviction, or "by the personal action of the Attorney General and only for good cause, physical or mental disability . . . , or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.* § 596(a)(1) (1994). The independent counsel law specifically provides that the United States District Court for the District of Columbia has jurisdiction to review a removal decision of the Attorney General upon petition by the ousted independent counsel. *Id.* § 596(a)(3) (1994). The Special Division, or the independent counsel, may terminate an OIC when an investigation and any resulting prosecutions are substantially completed. *Id.* § 596(b) (1994). The independent counsel is subject to congressional oversight, *id.* § 595 (1994), and must make periodic reports to the Special Division, *id.* § 594(h) (1994).[3]

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[3] The Supreme Court has held that the independent counsel law does not violate the Appointments Clause, Article III, or the

The unusual nature of the office notwithstanding, a duly appointed independent counsel is a prosecutor for the United States, and prosecutorial decisions of the nature here in question – who should be prosecuted and for what alleged crimes – have long been committed to the discretion of the prosecutor.[4] "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute. . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982)); *see also Massey v. Smith*, 555 F.2d 1355, 1356 (8th Cir. 1977) (per curiam) ("The authority to decide against whom federal indictments shall be sought lies almost exclusively with the United States Attorneys or the Justice Department, and their decisions in this regard are not generally subject to judicial review.").

Although prosecutorial discretion is not the precise issue here, we do not see any reason to believe that the

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separation of powers principles of the Constitution. *Morrison v. Olson*, 487 U.S. 654 (1988).

[4] As the Supreme Court noted in *Wayte v. United States*, 470 U.S. 598, 608 (1985), a prosecutor's decisions are not free from scrutiny when the challenge is to the constitutionality of those decisions, such as selective prosecution that violates the Equal Protection Clause. *See United States v. Batchelder*, 442 U.S. 114, 125 & n.9 (1979). But there is no constitutional right of a criminal defendant to choose his or her prosecutor and thus there can be no constitutional dimension to the challenge to the prosecutor's jurisdiction when it is conceded, as it is here, that there is *some* federal prosecutor who is empowered to bring the charges on which the appellees have been indicted.

Attorney General's referral decision is any more subject to judicial review than the usual prosecutorial decisions. But we need not rest our decision on intuition guided by a consideration of prosecutorial discretion and its unreviewability in its ordinary contexts, for the definitive answer to the question of reviewability in this case is found in legislative history that cannot be ignored (although the appellees and the District Court elected to do just that).

In 1987, the second time legislation establishing the independent counsel process was reauthorized, the conferees discussed the possibility of codifying the holdings of *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986), and *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (en banc) (per curiam) (the legislative history incorrectly referred to the case as *Banzhai v. Smith*), wherein two circuit courts of appeals "properly reflect[ed] legislative intent" by concluding "that no judicial review is available of decisions by the Attorney General not to conduct preliminary investigations." H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2185, 2188.[5]

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[5] The court in *Banzhaf v. Smith*, 737 F.2d 1167, 1168 (D.C. Cir. 1984) (en banc) (per curiam), held "that Congress specifically intended in the Ethics in Government Act to preclude judicial review, at the behest of members of the public, of the Attorney General's decisions not to investigate or seek appointment of an independent counsel with respect to officials covered by the Act." The court in *Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986), reached the same conclusion, noting its view, based on its reading of 28 U.S.C. § 595 (1994) – the provision concerning congressional oversight of the OIC – that Congress intended "that enforcement by members of congressional judiciary committees would be effective in preventing the Attorney General from refusing to obey the law."

The joint statement explained, however, that such a provision was not included in the jointly proposed legislation "because the conferees did not wish to suggest, by indicating a lack of judicial review of Attorney General decisions on preliminary investigations, that judicial review might be available of other Attorney General decisions under this chapter." *Id.* Thus one might quite logically conclude that, where Congress did intend there to be judicial review of Attorney General decisions, it specifically ordained judicial review, as it did when providing for judicial review of an Attorney General's decision to remove an independent counsel. To be certain that its point – that unreviewability of the Attorney General's decisions is the rule when the independent counsel law does not expressly provide otherwise – was not missed, the Committee stated, in no uncertain terms that "[t]he conferees agree that **an Attorney General's determinations under the independent counsel law are not subject to judicial review.**" *Id.* (emphasis added). The District Court and all the appellees studiously ignore this compelling language from the legislative history, despite the fact that it was brought to their attention, evidently finding it impossible to challenge.[6] We too think it is irrefutable,

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[6] In an apparent effort to avoid the illuminating legislative history concerning review of the Attorney General's decisions under the independent counsel law, the appellees urge that they are actually seeking (or, in addition, they are seeking) review of the Independent Counsel's decision to ask the Attorney General to refer, and his decision to accept referral of, the matters in question. This argument is specious. Any possible issue relating to counsel's decision to seek or to accept referral in this case is mooted by the decision of the Attorney General to refer the matters in question to the jurisdiction of the Independent

and conclude that this legislative history, which confirms the conclusion one logically would reach by reading the statute, settles the question. For us to hold otherwise would subvert congressional purpose in creating and empowering the independent counsel and in structuring the office as it did.

United States v. Juvenile Male, 923 F.2d 614 (8th Cir. 1991), to which the appellees direct our attention for the proposition that the Attorney General's referral is reviewable, is inapposite. In *Juvenile Male*, the issue was the reviewability of the Attorney General's decision to certify, under the Juvenile Justice and Delinquency Prevention Act, that the crime with which a juvenile was charged was a "crime of violence." The Court held that the certification in question was reviewable. *Cf. United States v. C.G.*, 736 F.2d 1474 (11th Cir. 1984) (holding certification under the Act that appropriate state court did not have jurisdiction was not reviewable); *United States v. Vancier*, 515 F.2d 1378 (2d Cir.) (same), *cert. denied*, 423 U.S. 857 (1975). We stated, "While this court may not have the power to guide a federal prosecutor's discretion, we must insure that the exercise of that discretion is within the confines" of the statute. *Juvenile Male*,

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Counsel. The contentions that it is the referral from the Special Division that is challenged here and that the courts may review that referral strike us as being even more specious, but in fact we need not and do not consider them. Referral by the Special Division, as noted above, was redundant and unnecessary. Given that the Attorney General has authority to make the referral independently, and did so here, the additional, identical referral by the Special Division, though it may be a source of additional comfort to the OIC, is a moot point in this appeal.

923 F.2d at 617-18. The argument that the Juvenile Male holding is applicable here ignores the definitive legislative history of the law reauthorizing the OIC that clearly evidences Congress's intent that (unless otherwise provided in the statute) the Attorney General's decisions under the independent counsel law are nonjusticiable. Further, the question whether a juvenile has been charged with a "crime of violence" is easily reviewed by a court and is well within the expertise of the judiciary. The "relatedness" determination at issue here, on the other hand, is an exercise of a discretion that only the prosecutor and the Attorney General command, because of their intimate knowledge of the course of the investigation, including witness statements, and of other proceedings that may be ongoing before the grand jury. That is, the "relatedness" question is largely without the standards that the judiciary typically requires for review, another reason for entrusting it, as Congress has, to the broad (and unreviewable) discretion of the Attorney General.

Reliance on *Gutierrez de Martinez v. Lamagno*, ___ U.S. ___, 115 S. Ct. 2227 (1995), in support of the appellees' position also is misplaced. *Gutierrez* was a case decided under the terms of the Westfall Act, which authorizes the Attorney General to certify that a federal employee sued for a wrongful or negligent act was acting within the scope of employment at the time of the alleged act, so that the United States is substituted for the defendant. In the ordinary case, such certification would allow a plaintiff to maintain an action under the Federal Tort Claims Act (FTCA), although because of an exception to the FTCA the result in *Gutierrez* was just the opposite, and the United States retained its sovereign immunity from

suit. The issue in *Gutierrez* was the reviewability of that certification. The Court noted two factors that "weigh[ed] heavily" in its analysis: that "the Attorney General herself urge[d] review," and that review is generally available "when a government official's determination of a fact or circumstance . . . is dispositive of a court controversy." *Id.* at ___, 115 S. Ct. at 2231.

Neither factor is present here. In this case, the Department of Justice, as amicus curiae, agrees with the Independent Counsel that the Attorney General's referral is not reviewable. Further, as is apparent from the District Court's unchallenged acknowledgement that these defendants properly may be prosecuted by the United States Attorney for the Eastern District of Arkansas (who has recused herself from matters concerning CMS) or by the Attorney General (who made the referral to the OIC), the Attorney General's referral does not "instruct[ ] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." *Id.* at ___, 115 S. Ct. at 2234. The absence of judicial review of the discretionary referral decision merely allows the prosecution to proceed without the delay that judicial review inevitably would entail; it does not direct the outcome of the prosecution. Further, unlike the situation in *Gutierrez*, this is not a case where the Attorney General has a vested interest in the referral such that she "is hardly positioned to act impartially." *Id.* at ___, 115 S. Ct. at 2233.

At oral argument we were directed to the admonition of the *Gutierrez* Court that "judicial review of executive action 'will not be cut off.' " *Id.* at ___, 115 S. Ct. at 2231 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967)). But considering our reading of the independent counsel

law and the uncontroverted legislative history we have discussed above, the full, unabridged language of the Court does not support the appellees' position, and actually supports our holding that the Attorney General's referral decisions are nonjusticiable: "Accordingly, we have stated time and again that judicial review of executive action 'will not be cut off **unless there is persuasive reason to believe that such was the purpose of Congress.**' " *Id.* (emphasis added). It is fair to say that the "reason to believe" here is more than just "persuasive," it is beyond reasonable dispute.

Accordingly, we hold that the Attorney General's referral decision under § 594(e) is not reviewable and that the District Court erred in holding otherwise.

II.

Even if the courts had jurisdiction to review the Attorney General's "relatedness" determination under § 594(e), which in Part I of this opinion we have held the courts do not have, we nevertheless would reverse the District Court, which reviewed the "relatedness" issue and disagreed with the Attorney General's determination. We begin our discussion of "relatedness" with a look at the factual basis, according to the indictment, for the charges against Tucker, Marks, and Haley.

The grand jury's indictment of June 7, 1995, was the culmination of an investigation that began on Independent Counsel Fiske's watch. The indictment alleged that Tucker and Marks made false material statements to CMS for the purpose of securing a $300,000 loan. Tucker and

Marks represented to CMS that the loan was for investment in D & L Telecommunications, Inc., when in fact it was used as part of the cash collateral pledged for a personal loan of $8.5 million from Fleet National Bank. Allegedly, $6 million of that loan was used to purchase controlling interest in Planned Cable Systems Corporation (PCS), a cable television company in which Marks, who was president of the company, already was a minor shareholder. According to the indictment, Haley acquired a "shelf" corporation, that is, one with no assets or operations, in Texas, called LMS. The appellees merged PCS into LMS and Marks was named president. In November 1987, LMS filed a fraudulent bankruptcy in the Northern District of Texas. The proposed reorganization plan, approved by all creditors listed in the bankruptcy schedules before LMS even filed its bankruptcy petition, transferred valuable cable television assets to Tucker, the only secured creditor listed, and to a corporation controlled by Tucker, listed as an unsecured creditor. The indictment alleges that this scheme was undertaken to avoid paying $4 million in taxes that would have been owed on a sale of the cable television assets.

Also relevant here is an indictment from the same grand jury handed down on August 17, 1995, after the arguments on the question of dismissal had been briefed to the District Court. The indictment charged Tucker, James McDougal, and Susan McDougal with fraudulent loan schemes involving Madison Guaranty and CMS.

As we mentioned in our discussion in Part I, "relatedness" in the context at issue here is an essentially standardless concept and, as the statute is written, one that is exceedingly broad. Section 594(e) requires only

that referred matters be "related to the independent counsel's prosecutorial jurisdiction." The term "related" is undefined and without parameters. Congress did not indicate the degree of consanguinity between matters that should be evident before jurisdiction may be properly asserted by the OIC (further indication, we might add, that it was to be a determination entrusted to the discretion of the Attorney General). We also think it is relevant to note that the original jurisdiction of this OIC, which is not at issue here, includes authority "to investigate other allegations or evidence of violation of any federal criminal law . . . **by any person or entity developed during the Independent Counsel's investigation** referred to above **and connected with** or arising out of **that investigation.**"[7] *In re Madison Guar. Sav. & Loan Ass'n*, Div. No.

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[7] The appellees seem to contend in parts of their argument that the Independent Counsel is relying on "arising out of" jurisdiction, as set forth in two places in the original grant of jurisdiction, for his referral jurisdiction. *See also* 28 U.S.C. § 593(b)(3) (1994) (scope of prosecutorial jurisdiction "shall also include the authority to investigate and prosecute Federal crimes . . . that may arise out of the investigation or prosecution of the matter"). They argue that the "arising out of" language concerns the investigation or prosecution of a crime committed as a direct result of the OIC's investigation or prosecution, that is, an obstruction of justice crime such as perjury. We need not decide whether "arising out of" as variously used in the original grant of jurisdiction should be so narrowly interpreted, as the OIC has jurisdictional authority to investigate and prosecute not only obstruction of justice crimes related to his grant of authority but also to investigate matters "developed during the Independent Counsel's investigation . . . and connected with or arising out of that investigation." *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1, Order at 2 (D.C. Cir. Sp. Div. Aug. 5, 1994) (emphasis added). Further, in order to acquire referral

94-1, Order at 2 (emphasis added); *see also* 28 U.S.C. § 593(b)(3) (1994) (scope of prosecutorial jurisdiction). Arguably, the prosecutions at issue fall within the broad grant of original prosecutorial jurisdiction without a referral even being necessary. *See United States v. Wilson*, 26 F.3d 142, 148 (D.C. Cir. 1994) ("[T]he scope of a special prosecutor's investigatory jurisdiction can be both wide in perimeter and fuzzy at the borders."), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1430 (1995). Even so, the OIC sought and received a referral from the Attorney General, which set forth with specificity the additional criminal matters to be investigated and possibly prosecuted by the OIC.

Considering the open-ended phrasing of § 594(e) and the expansive jurisdiction originally granted the OIC, we believe that the association between the original jurisdiction and the jurisdiction sought via referral need not be as intimate as the appellees suggest.[8] The appellees argue that the matters must be "demonstrably related" in order for referral jurisdiction to be proper. That language is excerpted from *Morrison v. Olson*, 487 U.S. 654 (1988),

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jurisdiction over a matter, the OIC does not need to rely on either the "arising out of" or the "connected with" language to justify his request; the referred matters need only be "related." 28 U.S.C. § 594(e) (1994).

[8] We reject the suggestion that the OIC has disavowed any relation between the indictment in this case and the Independent Counsel's original jurisdiction. We agree with the OIC that this is an obvious distortion of the Independent Counsel's position, which from the initial request for referral always has been that the matter with respect to which the OIC sought referral and the original grant of jurisdiction are indeed related within the meaning of the statute.

wherein the Supreme Court addressed the constitutionality of the independent counsel provisions of the Ethics in Government Act. Reference to the Court's entire discussion, however, makes it clear that the Court was not delimiting "relatedness" for the purpose of referral jurisdiction. Instead, the Court was observing that, due to the temporary nature of the OIC, "the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place," Congress properly conferred upon the Special Division the authority "to define the scope of the office." *Id.* at 679. The Court went on:

> This said, we do not think that Congress may give the Division *unlimited* discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

Id. It is clear that the limitation in question (assuming, as do the appellees, that "demonstrably related" is a genuine limitation) was upon the authority of the Special Division to define jurisdiction in the first instance, and was the result of the constitutional concerns (appointments clause and separation of powers) generated by Congress's decision to vest executive powers in the judiciary (the Special Division). "Demonstrably related" is not, as Marks asserts, "[t]he applicable legal standard for

evaluating whether the Independent Counsel has authority to prosecute the instant case." Brief of Appellee Marks at 13. We do not agree that the subject matter of the referral jurisdiction must be "demonstrably related" either " 'to the factual circumstances' that give rise to the appointment," Brief of Appellee Tucker at 10, or "to the subject matter of the Independent Counsel's jurisdiction," Brief of Appellee Marks at 13.[9] We thus reject the appellees, contention that the subject matter of the referral jurisdiction is required to relate to James McDougal's or President Clinton's or Mrs. Clinton's relationship to CMS or Madison Guaranty or the Whitewater Development, which is the subject matter of the Independent Counsel's original investigatory jurisdiction. If that were the test for a proper referral, then referral never would be necessary and § 594(e) would be superfluous. We think it is clear that, contrary to the appellees' arguments, relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred.

The matters over which the OIC sought referral jurisdiction were developed during the investigation conducted by the OIC under the original grants of jurisdiction, first the jurisdiction of the regulatory Independent Counsel (Fiske) and then the statutory Independent Counsel (Starr). It is apparent from the record before

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[9] Haley simply argues that the independent counsel law and *Morrison* "require that matters to be referred must be 'demonstrably related,' " Brief of Appellee Haley at 5, although to what they must be so related is not stated.

us, even though grand jury proceedings to which we are not privy continue, that there is overlap in witnesses and in defendants between the original prosecutorial jurisdiction (*see* August 17, 1995, indictment) and the referral jurisdiction (*see* June 7, 1995, indictment). Further, as the August 17 indictment demonstrates, there is a clearly defined relationship between Tucker (referral) and McDougal (original), Tucker (referral) and CMS (original and referral), and Tucker (referral) and Madison Guaranty (original). (CMS was an entity named in the original grant of jurisdiction and allegedly defrauded by the activities charged in the August 17 indictment, and material false statements to CMS by Tucker and Marks constitute a part of the charges in the June 7 indictment.) We have no difficulty in concluding that the required relatedness between original and referral jurisdiction is present here.

The appellees further argue that they are not "persons" within the meaning of 28 U.S.C. § 591 (1994) who can be investigated by the OIC, and therefore they cannot be prosecuted by the OIC for wrongdoing. The covered "persons" described by § 591(b) are highranking federal executive officials and national campaign committee officers. Tucker, Marks, and Haley are outside the definition. But § 591(b) refers to persons to whom § 591(a) applies, and § 591(a) sets out the requirement of a preliminary investigation by the Attorney General:

> The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in

> subsection (b) may have violated any Federal criminal law. . . .

Thus it is the alleged culpability of a covered "person" that may require the Attorney General to conduct an initial preliminary investigation. But the ultimate scope of jurisdiction of the OIC – whom he may investigate and whom he may prosecute – as determined by the Special Division, is not necessarily limited to covered persons, and neither is referral jurisdiction. Moreover, referral jurisdiction requires only relatedness to the original prosecutorial jurisdiction; nowhere do the OIC provisions require that a § 591 preliminary investigation into the involvement of covered persons be conducted before a matter may be referred to an existing OIC. Finally, the appellees' argument is in any event inapposite to their case, for here the Attorney General originally sought the appointment of independent counsel under 28 U.S.C. § 591(c) because the investigation and prosecution would present a "political conflict of interest," not because covered persons were the targets.

The appellees also argue that the Independent Counsel was, in reality, seeking expansion jurisdiction, not referral jurisdiction, and that he did not comply with the requirements of expansion jurisdiction, or, in the alternative, that he **should** have sought expansion jurisdiction instead of referral jurisdiction. Expansion jurisdiction may be granted to the OIC by the Special Division upon the request of the Attorney General, if possible violations of criminal law by § 591(b) "covered persons" that are outside the prosecutorial jurisdiction of the OIC come to the attention of the independent counsel. 28 U.S.C.

§ 593(c) (1994). If, after a 28 U.S.C. § 592 (1994) preliminary investigation, the Attorney General determines that further investigation is warranted, the Special Division then must either expand the existing OIC's jurisdiction or appoint another independent counsel. The argument that the Independent Counsel and the Attorney General failed to comply with the requirements of § 593(c) (expansion jurisdiction) is irrelevant to this case, because in fact the Independent Counsel did not seek expansion jurisdiction. He clearly sought – and received – referral jurisdiction under § 594(e), obviating any need to comply with the requirements for expansion jurisdiction. As for the contention that the Independent Counsel should have sought expansion jurisdiction in the first place, and not referral jurisdiction, our decision that referral was proper because the referred matter is related to the Independent Counsel's prosecutorial jurisdiction renders this argument moot.

Assuming for the sake of argument that the discretion exercised by the Attorney General in referring "related" matters to the OIC is reviewable, and giving the Attorney General the deference that is due such discretionary decisions, we hold that she did not abuse her discretion in determining that the subject matter of the referral jurisdiction in this case is "related" to the Independent Counsel's original prosecutorial jurisdiction within the meaning of 28 U.S.C. 594(e). The OIC has jurisdiction to prosecute this case.

III.

We come now to the Independent Counsel's request that this case be assigned to a judge other than Judge Woods upon remand to the District Court. We conclude that this request must be granted to preserve the appearance of impartiality.

The Independent Counsel relies primarily on newspaper articles to support his request.[10] First, there are articles that connect Judge Woods and Hillary Rodham Clinton. Judge Woods appointed her as counsel for a special committee in the Pulaski County, Arkansas, school desegregation case, and was quoted as saying that he "did work with Hillary" and that he "came to admire her during that period." Rex Nelson, *Road to Tucker trial full of twists for Judge Woods*, Ark. Democrat-Gazette, Sept. 3, 1995, at 1A, 20A; *see also* Connie Bruck, *Hillary the Pol*, New Yorker, May 30, 1994, at 58, 69. In the Arkansas Democrat-Gazette article, the newspaper reported that Judge Woods said, "If anything came up regarding President Clinton, I would recuse," because of the Judge's relationship with Hillary Clinton. Nelson, *supra*, at 20A. A column in a daily periodical with national – actually international – circulation reported that Judge Woods wrote to then Deputy White House Counsel, the late Vincent Foster, in July 1993 to ask whether he should grant an interview where the topic was to be Hillary

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[10] In order to adequately consider the Independent Counsel's argument for reassignment, once having determined that his request is properly ours to grant, *see infra*, we asked the OIC to supplement the record by providing to the Court copies of the articles upon which he relies.

Rodham Clinton. Micah Morrison, *Arkansas Judge Runs the Clock on Whitewater*, Wall St. J., Oct. 4, 1995, at A14. Finally, in a column criticizing efforts "to get federal Judge Henry Woods, a Democratic appointee, off Gov. Jim Guy Tucker's criminal case," the author acknowledged, "Indeed, the judge spent the night at the White House the night Republicans swept a majority of Congress last November." Max Brantley, *Political notebook*, Ark. Times, June 30, 1995, at 16.

For their part, President and Mrs. Clinton have been reported to have expressed continued support for Tucker since his indictment by the grand jury. It was reported in an article on the front page of the Arkansas Democrat-Gazette that, the day after Tucker pleaded not guilty to the charges in this case, the Clintons attended a fund-raising luncheon in Little Rock, Arkansas, where Tucker received a "sustained standing ovation." Noel Oman & Peter Aronson, *Clinton lunch also a feast for Tucker*, Ark. Democrat-Gazette, June 24, 1995, at 1A. At the event, solidifying his connection with the recently indicted Tucker, the President said in a speech, "I am especially glad to see Governor and Mrs. Tucker here today and especially grateful for the reception you gave them." *Id.* at 12A. Tucker also acknowledged the perceived connection when he was quoted in an interview as saying of the OIC, "I think that's been much of their goal, to try and tar the [p]resident with images of wrongdoing here in his home state." *Inside Politics* (Cable News Network, Inc., television broadcast, June 21, 1995).

The appellees object to the Independent Counsel's request on several grounds, among them: that the issue was not raised in the District Court and is raised now

only because the Independent Counsel did not like the result reached in the proceeding below; that "the motion is . . . frivolous because it is obviously premature to raise such a motion in an appellate court," Brief of Appellee Marks at 38; that Judge Woods's political affiliation, and the Independent Counsel's affiliation with another political party, comprise the basis for the argument; and that the argument is "an improper vehicle for the publication of a personal attack on Judge Woods for the purpose of distracting this Court from a proper review of the district court's dismissal ruling on its merits," *id.* Most of the appellees' claims are undeserving of comment, and we summarily reject the suggestion that appellant's brief is evidence that Judge Woods's political persuasion forms the basis for the Independent Counsel's request. Nowhere do the appellees give us reasons for concluding that the matters the Independent Counsel has brought to our attention do not create an appearance of bias.

We also reject the contention that the Independent Counsel's request is improperly made to this Court in the first instance rather than to Judge Woods. The appellees' arguments stem from their confusion about the source of our power to grant the OIC's request. "Federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances,' 28 U.S.C. § 2106." *Liteky v. United States*, ___ U.S. ___, ___, 114 S. Ct. 1147, 1156-57 (1994). Thus we are empowered to "direct the entry of such appropriate . . . order . . . as may be just under the circumstances," 28 U.S.C. § 2106 (1994), including reassignment of the case

where, in the language of 28 U.S.C. § 455(a) (1994), the district judge's "impartiality might reasonably be questioned." *See Dyas v. Lockhart*, 705 F.2d 993, 997-98 (8th Cir.) (remanding to another district judge to assure the appearance of impartiality, notwithstanding that appeal was from court's failure to recuse *sua sponte* and the issue was never raised in the district court), *cert. denied*, 464 U.S. 982 (1983).

The Independent Counsel does not seek review of Judge Woods's failure to disqualify himself under 28 U.S.C. § 144 (1994), which requires the party seeking recusal to timely file an affidavit alleging facts showing bias with the district judge that he wishes to be disqualified. Unlike § 144, § 455 sets forth no procedure for seeking recusal in the district court. *See Liteky*, ___ U.S. at ___, 114 S. Ct. at 1153 (as distinguished from § 144, § 455 "place[s] the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit"). The appellees' reliance on either the language of § 144 or on cases interpreting § 144 is misplaced.

Further, the Eighth Circuit cases cited by the appellees are distinguishable. *See United States v. Bauer*, 19 F.3d 409, 414 (8th Cir. 1994) ("This Court has held that claims under § 455 'will not be considered unless timely made.' ") (quoting *Holloway v. United States*, 960 F.2d 1348, 1355 (8th Cir. 1992)). This is not a case like *Bauer* and *Holloway* where actual bias under § 455(b) is alleged, and where a judge arguably should have an opportunity first to answer charges of partiality. *See* 28 U.S.C. § 455(b) (1994) (requiring recusal in cases of actual bias, conflicts of interest, and where certain relatives of the judge are

involved in the proceedings before the court). Nor is the Independent Counsel seeking to have the judgment vacated on appeal as a remedy for the judge's failure to recuse. In fact, the Independent Counsel seeks no appellate review at all. Rather, he asks to have the case reassigned to a judge other than Judge Woods, under the § 2106 powers of this Court, in the event we reverse the dismissal of the indictment and remand the case for trial. The Independent Counsel made his request for reassignment in his appellant's brief. Under § 2106, that is all that is required to make the request timely.

We turn now to the merits of the OIC's request. Under § 455(a), "disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *Gray v. University of Ark.*, 883 F.2d 1394, 1398 (8th Cir. 1989). Section 455(a) "was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988). In determining, then, whether remand to a different district judge is warranted to achieve the goal of ensuring "the *appearance* of impartiality," we apply "an objective standard of reasonableness." *United States v. Poludniak*, 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982). It is the appearance of bias or partiality that matters here, not actual bias.

The Independent Counsel argues that, because of the "unmistakable appearance" of bias or partiality here, "[r]eassignment is necessary to preserve the appearance and reality of justice." Brief of Appellant at 42. We agree.

Based on the information before us in this case, we conclude that the risk of a perception of judicial bias or partiality is sufficiently great so that our proper course is to order reassignment on remand.[11] As we have discussed, Judge Woods's link with the Clintons and the Clintons' connection to Tucker have been widely reported in the press. Moreover, as the Independent Counsel has noted, "this case will, as a matter of law, involve matters related to the investigation of the President and Hillary Rodham Clinton." Reply Brief of Appellant at 25. Given the high profile of the Independent Counsel's work and of this case in particular, and the reported connections among Judge Woods, the Clintons, and Tucker, assignment to a different judge on remand is required to insure the perception of impartiality.

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[11] The Independent Counsel also directs our attention to certain comments in the District Court's opinion, which were reported in the local Arkansas press, that, in the view of the OIC, "displayed hostility to the Independent Counsel system." Brief of Appellant at 46-47. We do not consider these comments to be persuasive evidence of a perceived bias or partiality.

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky, ___ U.S. at ___, 114 S. Ct. at 1157. We conclude that the passages referred to by the OIC, standing alone, would not cause a reasonable person to doubt Judge Woods's impartiality.

As a practical matter, there is no shortage of other judges in the Eastern District of Arkansas to whom this case may be assigned. Apart from whatever time Judge Woods spent in ruling on the motion to dismiss the indictment, judicial resources have not been expended on the case and neither judicial, prosecutorial, nor defense efforts will have to be duplicated when the case is reassigned. The OIC's request for reassignment is granted, not because we believe Judge Woods would not handle the case in a fair and impartial manner (we have every confidence that he would), but only because we believe this step is necessary in order to preserve the appearance as well as the reality of impartial justice.

IV.

We have taken with the case Marks's motion to strike portions of appellant's brief and appendix, which according to Marks contain "Offending Materials."

We first reject, without lengthy comment, the contention that any part of the appellant's brief raised frivolous arguments or that the brief "reflects a considered decision by the Independent Counsel to attack Judge Woods personally rather than to address the correctness of the trial court's decision on its legal merits." Motion to Strike and Brief in Support Thereof at 12-13. As we have concluded in this opinion, not only are the Independent Counsel's arguments not frivolous, they are meritorious, and the bulk of his brief is indeed devoted to "address[ing] the correctness of the trial court's decision on its legal merits." In any case, Marks need not be concerned that we so easily could be distracted from our duty to review

the merits of an appeal that is properly before us. Throughout his motion, Marks mischaracterizes Independent Counsel's advocacy, and comes perilously close to having filed a frivolous motion.

As for the materials that Marks claims have no business being cited in appellant's brief or being included in appellant's appendix, we conclude that they are either documents properly in the record in this case; legal authority properly cited to the Court; or publicly filed or disseminated documents or articles of which we properly may take judicial notice. Here, too, Marks's argument is devoid of merit.

The motion is denied.

V.

The judgment of the District Court dismissing the indictment for lack of prosecutorial jurisdiction is reversed and the case is remanded for trial. The Independent Counsel's motion for reassignment of the case is granted, and the Chief Judge of the United States District Court for the Eastern District of Arkansas is instructed to see that the case is assigned to a judge other than Judge Woods. Marks's motion to strike portions of the Independent Counsel's brief and appendix is denied.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3268EA

United States of America,

Appellant,

vs.

Jim Guy Tucker; William J. Marks, Sr.; John H. Haley,

Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas

[PUBLISHED]

United States Department of Justice; Sun Diamond Growers of California,

Amicus Curiae.

The suggestions for rehearing en banc are denied. Judge McMillian and Judge Murphy would grant the suggestions for rehearing en banc. Judge Hansen would grant the suggestions for rehearing en banc to the extent the suggestions raise the issue of the disqualification of Judge Woods.

The petition for rehearing by the panel is also denied.

Chief Judge Richard S. Arnold and Judge Morris Sheppard Arnold took no part in the consideration or decision of this case.

MCMILLIAN, Circuit Judge, dissenting, with whom MURPHY, Circuit Judge, joins.

Neither law nor fact supports the panel's decision to disqualify Judge Henry Woods from presiding at the trial of *United States v. Jim Guy Tucker*. Judge Woods is one of this circuit's most experienced and respected trial judges. He has served his community, his state, and his nation with distinction for more than fifty-six years. For a panel of this court to disqualify Judge Woods "to preserve the appearance of impartiality" is a disservice to the federal judiciary. To do so on the basis of newspaper and magazine articles and without the issue having been raised in district court, giving Judge Woods an opportunity to respond, compounds the indignity.

Because we believe that this decision not only demeans the reputation of an honorable member of the federal judiciary, but incorrectly applies the clearly established procedural, evidentiary, and substantive standards required by 28 U.S.C. § 455(a), we believe that this court should rehear this case en banc and reverse the panel's decision. Therefore, we dissent from its decision to deny the suggestion for the petition for rehearing en banc.[1]

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[1] Although this dissent focuses upon Judge Woods, disqualification, the panel opinion, in holding that the judiciary lacks jurisdiction to review the scope of the authority of the special prosecutor, commits fundamental error. It fails to separate the unauthorized review of the special prosecutor's exercise of discretion from the scope of the special prosecutor's statutory authority. *See Morrison v. Olson*, 487 U.S. 654, 684 (1988) ("We emphasize, nevertheless, that the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act."); *cf. United States v.*

The panel concedes that there are no past or present political or social relationships between Judge Woods and defendant Tucker. Yet, based on the allegations printed in various newspaper articles, the panel concludes that the reported friendship between Judge Woods and the Clintons in conjunction with the Clintons' occasional political association with defendant Tucker creates an "unmistakable appearance" of bias or partiality. As a consequence of this conclusion, the panel disqualifies Judge Woods and remands the case for reassignment. This standard lacks any precedential or statutory foundation and establishes an unworkable guideline defining what constitutes the appearance of partiality.

Although this court has on occasion invoked its power to reassign a case, it has done so sparingly and only where our court was presented with unusual circumstances. *See, e.g., Reserve Mining Co. v. Lord,* 529 F.2d 181 (8th Cir. 1976). By contrast, the panel's exercise of its supervisory power in response to the Independent Counsel's request, which failed to present a basis for procedural exemption, deviates from our court's precedent both with respect to the disqualification standard as well as the process by which disqualification requests must be made. More importantly, the panel's venture into uncharted waters establishes a dangerous precedent that is not only difficult to reconcile with this court's past decisions, but will return to haunt us in the future. In particular, we

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Juvenile Male, 923 F.2d 614, 618 (8th Cir. 1991) ("While this court may not have the power to guide a federal prosecutor's discretion, we must ensure that the exercise of that discretion is within the confines of section 5032.").

object to the unusual procedural departure employed by the panel to reach the merits of a request not first brought before the district court in a timely fashion. We also protest the evidentiary foundation on which the panel concludes that an "unmistakable appearance" of partiality exists and the unusual process by which that evidence was introduced. Finally, we reject the standard applied to Judge Woods – i.e., a friend of a friend creates an impermissible appearance of bias – as without precedential support and unworkable. Because of the importance of the issues, we address the grounds for each of our objections below.

A. The Procedural Requirements for Section 455.

This court has repeatedly held that section 455[2] recusal motions must be raised first with the district

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[2] 28 U.S.C. § 455 (1994) provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning

court; the appellate court then reviews the district court's determination for an abuse of discretion. *See, e.g., Pope v. Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992); *In re Hale*, 980 F.2d 1176, 1178 (8th Cir. 1992); *accord United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991). Judge Bowman, the author of the panel opinion, has previously made this point:

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the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

> Relief under section 144 is expressly conditioned on the timely filing of a legally sufficient affidavit. . . . In addition, although section 455 has no express timeliness requirement, this Court has held that claims under this section will not be considered unless timely made.

Halloway v. United States, 960 F.2d 1348, 1355 (8th Cir. 1992).

Parties are required to apply for recusal "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim," *Apple v. Jewish Hosp. & Medical Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987), for two reasons: 1) a prompt application affords the district judge an opportunity to assess its merits, and 2) a prompt application avoids the risk that a party is holding back a recusal motion as a fall-back position in the face of an adverse ruling. *See In re International Business Machine Corp.*, 45 F.3d 641, 643 (2d Cir. 1995); *accord In re Cargill, Inc.*, 66 F.3d 1256, 1262-63 (1st Cir. 1995) ("In the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns."); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) ("Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits."), *cert. denied*, 481 U.S. 1016 (1987).

The Independent Counsel's tardy request confronts this court with just such considerations. The Independent Counsel was undoubtedly aware of the connections he cited as the basis for his request prior to the hearing

before Judge Woods.[3] Yet, he did not bring the matter to the attention of Judge Woods, or to any court, until after Judge Woods had made his unfavorable ruling. The failure to move for a judge's recusal in a timely fashion is grounds for its denial. *See In re Apex Oil Co.*, 981 F.2d 302, 304 (8th Cir. 1992). Moreover, the timing of the motion to recuse Judge Woods, after the Independent Counsel suffered the adverse ruling, renders the request suspect as a litigation strategy rather than an ethical concern. To this extent, observers could feel the Independent Counsel has politicized this case in an effort to draw a different judge.

In the face of overwhelming precedent, the panel distinguishes the present case by asserting that the timeliness requirement is limited to motions made pursuant to section 455(b). The panel cites no authority for this proposition. Although distinctions between sections 455(a) and 455(b) exist, *see Liteky v. United States*, 114 S.Ct. 1147, 1163 (1994) (Kennedy, J. concurring), this court has never before recognized a distinction between the two sections with respect to timeliness; for example, when denying a criminal defendant's post-conviction motion to disqualify, the *Holloway* panel referred to the implicit timeliness requirements of section 455, making no effort to limit this requirement to 455(b). *Holloway*, 960 F.2d at 1355. There is

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[3] Most of the articles cited by the panel as the evidentiary foundation for its decision were published before the September 5, 1995 hearing before Judge Woods. The substance of those articles is presumed to be known as of the date of publication. *See Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143, 147 (8th Cir. 1991) ("[T]he matter was known to the defendants when newspaper articles, which constituted the entire basis for the defendants' motion, were published. . . . ").

simply neither statutory language nor legislative history nor judicial precedent to support the panel's distinction. Quite to the contrary.

Because section 455 includes no express procedural provisions, courts have developed the appropriate procedures by judicial construction. *Id.* In addition to the fact that the timeliness requirement has been applied to both 455(a) and 455(b) by this and other circuits, *see, e.g., In re Apex Oil Co.*, 981 F.2d at 304; *Yonkers Bd. of Educ.*, 946 F.2d at 183, analysis of the statute's operation and language compels a conclusion converse to that drawn by the panel; if any portion of section 455 requires that a motion be timely made, it is section 455(a). Although the panel asserts that in instances of alleged actual bias "a judge arguably should have an opportunity first to answer the charges of partiality," the real need for a judge to respond lies with a section 455(a) inquiry into the appearances of partiality. Section 455(b) delineates, in clear terms, "instances where actual bias is assumed" and disqualification is required. *Liteky*, 114 S. Ct. at 1163 (Kennedy, J. concurring). Thus, if the judge is the spouse of a party to the proceeding, see 28 U.S.C. § 455(b)(5)(i), the judge must be disqualified. By contrast, section 455(a) requires disqualification "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Clearly, it is the investigation into perceptions and the reasonableness of those perceptions, not an inquiry into the existence of a carefully defined relationship, that requires the relevant facts and explanations from all sides.

Furthermore, the statutory language of another 455 paragraph also supports the proposition that section 455(a) requires a timely motion. Section 455(e) provides:

> No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455(e) (1994). The fact that 455(a) may be waived and 455(b) may not be waived corroborates what can be inferred from the different nature of the two inquiries: timeliness of the recusal request is less important in the case of 455(b). In effect, the panel's interpretation of section 455 creates a broader, implicit waiver under 455(b), the section for which waiver is statutorily precluded, than that which is provided by express statutory language for 455(a).[4] There is no dispute that this court has held that section 455 motions must be timely made. *Holloway*, 960 F.2d at 1355. Having done so, this court inexplicably limits that requirement to the paragraph of section 455 that least demands such a procedural safeguard.

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[4] This is not to say that the Independent Counsel waived his right to seek disqualification. Given that the issue was not raised before the district court, there is no record of disclosure or waiver. This consideration is merely another indication that the panel's interpretation of 455(a)'s procedural requirements is at odds with the statute's structure.

Although it analyzes the merits of the Independent Counsel's request to disqualify Judge Woods under the rubric established by section 455(a), the panel suggests that it is not acting pursuant to its appellate powers under that statute, but rather pursuant to the powers conferred on appellate courts by 28 U.S.C. § 2106.[5] Although we do not dispute this court's power to reassign a case in accordance with its supervisory power, this power has been reserved in the past to unusual cases in which compliance with procedural requirements might be excused. *See In re International Business Machines Corp.*, 45 F.3d at 643 (invoking its § 2106 power to reassign a case after the district court judge denied a motion to recuse and underlying litigation deferred pending motion for a writ of mandamus). The panel mistakenly cites *Dyas v. Lockhart*, 705 F.2d 993 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983), as authority for its action. Although this court did reassign the *Dyas* case, the facts in that case were quite different from those presented here. In *Dyas*, Judge Roy had dismissed a habeas petition regarding a fair-trial issue that she had previously decided as a state supreme court judge. *Id.* at 995. We made no explicit findings regarding the appearance of impartiality; instead, we

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[5] 28 U.S.C. § 2106 (1994) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

reassigned the case because the judge indisputably had preconceived ideas about the issue to be decided. There is nothing about the Independent Counsel's request that could provide a basis for disregarding normal procedures in this case. Thus, the panel's decision suggests that the procedural requirements may be ignored because litigants may raise the issue directly with the appellate court pursuant to its section 2106 powers. Not only is this proposition at odds with this court's many holdings regarding procedural requirements, it is contrary to the norms of judicial process and the dignity of federal district court judges.

There is good reason for requiring that motions for recusal be made to the district court judge in a timely fashion. Under the procedure employed in this case, the appellate panel had no choice but to decide the reasonability of questions regarding impartiality based on newspaper articles asserting various friendships and reporting that defendant Tucker believes that his investigation is part of a political smear campaign against the President of the United States. This court has always taken a strong stance in upholding the dignity and autonomy of district court judges. To now hold that a judge need not be provided with an opportunity to respond to allegations impugning his ability to be impartial contradicts this strongly-held principle.

B. The Evidentiary Foundation

Even if the Independent Counsel had made a timely disqualification motion, the panel bases its "appearance of partiality" determination on evidence that was not

properly before the court on appeal and lacked sufficient reliability.

1. Supplementing the Record

In considering the Independent Counsel's motion for the disqualification of Judge Woods, the panel asked the Independent Counsel to supplement the record by providing the court with copies of the media reports upon which he had based his motion. Although it is within a district court's discretion to reopen a record for evidentiary supplementation, *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331-32 (1971); *Briscoe v. Fred's Dollar Store, Inc.*, 24 F.3d 1026, 1028 (8th Cir. 1994), and an appellate court may remand an issue to the district court for an appropriate evidentiary hearing to develop the record, *see Easley v. University of Mich. Bd. of Regents*, 853 F.2d 1351, 1358 (6th Cir. 1988), the panel rejected this course of action. Instead, it asked one party to submit evidence regarding an issue raised for the first time on appeal. The items contained in the supplement were never tested by normal evidentiary standards. Although the panel was undoubtedly acting out of concern for judicial economy, the method by which it developed the record that formed the basis of the panel's decision is contrary to evidentiary rules and precedent. *See Lussier v. Runyon*, 50 F.3d 1103, 1113 (1st Cir. 1995) (the court's "unilateral pursuit of evidence without affording the parties the standard prophylaxis . . . generally obtain[ed] at trial" warrants reversal).

2. Reliability of the Evidence

Not only was the inclusion of the media reports into the record improper, the reports themselves are a source of information insufficiently reliable to form the sole basis for the panel's "appearance of partiality" determination. In the context of section 455, this court has been extremely skeptical of press reports as a basis for a finding of partiality. *See, e.g., United States v. Darden,* 70 F.3d 1507, 1536 (8th Cir. 1995) (district court's in-court explanation of its remarks quoted in a newspaper article negated implication of judicial bias); *Miller v. Tony & Susan Alamo Found,* 924 F.2d 143, 146-147 (8th Cir. 1991) (untimely-submitted newspaper articles deemed "rank hearsay and demonstrably inaccurate"). These cases, and others, have recognized the great potential for the media to generate inaccurate or misleading information. *See United States v. Cooley,* 1 F.3d 985, 994 (10th Cir. 1993) (reporters' personal opinions or characterizations appearing in the media ordinarily should not satisfy the requirements for disqualification under § 455(a)); *Easley,* 853 F.2d at 1356, n.4 (quoted statements in isolation can misrepresent the tenor of an entire interview or misconstrue a person's intentions). Although the appearance of partiality can result from press reports, it does not necessarily follow that there is a direct correlation between the publication of an allegation and the perceptions of the reasonable public. Moreover, it is injudicious to permit the perceived impartiality of a judge to be held hostage by the writings or reporting of the media without concern for the accuracy of those reports or potential explanation.

The panel disqualifies Judge Woods because it apparently believes that the media reports it cites have created a public perception that Judge Woods cannot act impartially in this case. The practice of relying on newspaper and magazine articles as proof of substantive fact has no support in the rules of evidence. Moreover, as the panel's decision stands, this court will often be asked to act in response to the assumed perceptions created by columnists, writers, and journalists. Editorials, investigative journalism, and other popular writings certainly impact the public's perceptions and have their place in the judicial process. But these kinds of opinions, often biased and colored, cannot substitute for properly-tested evidence.

C. The Standard for Disqualification Under Section 455(a)

Upon its arrival at the merits of the Independent Counsel's request, the panel sets out to determine whether a "reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *Tucker*, No. 95-3268, slip op. at 11 (8th Cir. March 15, 1996) (*citing Gray v. University of Ark.*, 883 F.2d 1394, 1398 (8th Cir. 1989)). Although this accurately states the abstract standard required by section 455(a), the panel's analysis fails to apply that standard in two significant respects: 1) it skews the reasonable person standard from one "who [knows] the circumstances" to one who has read or heard certain allegations, and 2) it enunciates an unworkable,

bright-line standard under which any two-step relationship between the presiding judge and a party constitutes an "unmistakable appearance of bias or partiality."

1. The Reasonable Person Standard

There is no question but that disqualification for the appearance of partiality is limited to those instances in which a reasonable person would have such doubts. In adopting the 1974 amendments to section 455, Congress cautioned:

> in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

H.R. Rep. No. 1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. In its decision, the panel ignores the "who knows the circumstances" modifier of the reasonable person standard. Implicitly, the panel asserts that when faced with some information raising a reasonable question regarding a judge's impartiality, a party need

not investigate further whether there are equally reasonable answers to those questions; instead, the party may immediately seek that judge's disqualification. We cannot agree. The conclusions drawn by a reasonable person presented with only one side of a story will frequently be different than those made after careful consideration of all circumstances. *See, e.g., Little Rock Sch. Dist. v. Arkansas State Bd. of Educ.*, 902 F.2d 1289, 1292 (8th Cir. 1990) (holding that judge's responses to a reasonable neutral observer's questions regarding impartiality sufficient so as not to require disqualification).

The failure to consider all evidence, including potentially reasonable responses that could resolve or mitigate questions regarding impartiality, lacks common sense and fails to acknowledge that there are often simple and reasonable explanations to reasonable perceptions of partiality. *See, e.g., United States v. Darden*, 70 F.3d 1507, 1536 (8th Cir. 1995) ("The morning the articles were published, the court explained its remarks to the defendants and the attorneys. This explanation revealed no bias against the defendants."). The most logical source of such counter-evidence is the source of the perceived partiality: the judge. Because Judge Woods had no opportunity to address the Independent Counsel's concerns, the panel is unable to consider any of his potential answers. Instead, the panel places the burden of defending Judge Woods, impartiality with the party opposing the Independent Counsel, Jim Guy Tucker. *See Tucker*, No. 95-3268, slip op. at 10 (8th Cir. March 15, 1996). This is insufficient for the purposes of a section 455(a) inquiry and an insult to Judge Woods.

By explicitly providing for a party's waiver of any perceived judicial partiality, *see* 28 U.S.C. § 455(e), Congress clearly intended that such perceptions be aired before the presiding judge who might then allay any concerns held by a party. With this legislative intent in mind, we believe that a standard that does not consider all of the circumstances, including any response provided by a district court judge, is incorrect. Moreover, it invites forum shopping as parties present evidence of impartiality to appellate courts regarding district court judges who are left without the ability to respond or dispel any allegations or perceptions. A more sensible approach would ask whether a reasonable person, knowing the basis for perceived partiality and any explanation or response to such perceptions, maintains questions regarding the impartiality of a judge. Unfortunately, the panel's lopsided inquiry will ensure frequent and improvident disqualifications in the future.

2. The Two-Step Relationship

Our second point of contention with the panel's analysis of the merits pertains to its conclusion of an unmistakable appearance of partiality. The proposition that a two-step relationship, such as a friend of a friend, creates the appearance of partiality must be rejected as overly broad, unpracticable, and inconsistent with our other decisions that limit the scope of perceived partiality to a reasonable standard. *E.g., In re Apex Oil Co.*, 981 F.2d at 30405 (denying a motion that judge recuse himself despite his tenuous involvement in litigation against the appellee).

A section 455 inquiry will always be fact-intensive, making it difficult to glean broad principles of application. The record in this case is so sparse, however, that it would be difficult not to deduce a bright-line rule requiring disqualification in instances where the judge has a close relationship to someone who has a connection to a party. The record, as described by the panel,[6] indicates a relationship between Judge Woods and Hillary Clinton of such a nature that Judge Woods would be required to disqualify himself from presiding in a case in which either of the Clintons were a party. The record also indicates that there were some political associations between President Clinton, a former Democratic governor of Arkansas, and defendant Tucker, the current Democratic Governor of Arkansas. Taken on its face, the record does not reveal that the relationship was anything other than political. Nor does the record or the panel suggest that there is any other tie between Judge Woods and defendant Tucker. As such, we cannot help but conclude that this decision establishes a per se rule finding an "unmistakable appearance of partiality" where a party is an associate or friend of an individual who has close connections with the presiding judge. Moreover, given that section 455(b) requires a judge to disqualify herself where she or her spouse is related within the third degree to an individual who is either a party, an acting attorney, or has a substantial interest in the proceeding, it would be inconsistent not to apply the panel's bright-line rule to

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[6] Although we reject the evidence relied upon by the panel as a sound basis for its decision, for purposes of this argument we accept the allegations as fact.

these individuals who are statutorily marked as creating impermissible questions of bias. Thus, under the standard developed by this panel, a friend or associate of a judge's granddaughter would raise questions of partiality requiring recusal. Clearly, this represents a departure from common sense.

Section 455 was never intended to disqualify judges from presiding over cases in which there might be a tenuous connection between the judge and a party. *See In re Apex Oil Co.*, 981 F.2d at 304-05; *United States v. Lovaglia*, 954 F.2d 811, 816 (2d Cir. 1992); (holding that past social relationship between judge and crime's victim did not create appearance of bias); *In re Allied Signal*, 891 F.2d 974, 976 (1st Cir. 1989) (holding that claim of partiality based on a series of social and business contacts between presiding judge and attorney years before was frivolous). Because the meager record supports a finding of only the most tenuous connection between Judge Woods and defendant Tucker, we maintain that this court has no choice but to reject the assertion of perceived partiality as a matter of law.

Conclusion

The basis for the decision to reassign this case is unique. This court has considered 28 U.S.C. § 455 over fifty times; the panel's decision today represents a marked departure from these decisions. *Reserve Mining Co. v. Lord*, 529 F.2d 181 (8th Cir. 1976), illustrates the serious nature and circumstances that surround judicial reassignment. In *Reserve Mining*, we reassigned the action only after the district court judge openly disregarded a mandate of this

court and took positions in the litigation more consistent with an advocate than a judge. *Id.* at 184-86.

If we are to consider the disqualification of any district court judge "in order to preserve the appearance of impartiality," we should do so on the basis of a clear record after the district judge has had an opportunity to respond. With respect to the merits of the panel's decision, being a friend of a friend is not in itself a proper or adequate basis for disqualification. This court has never before based a decision on guilt by association, and now is not the time to start. If this principle is rejected, what becomes clear is that this case was not the result of established norms and procedures, but of special considerations and concerns. Given the highly political nature of this case and the necessity of the court to rule on the merits of the underlying litigation, the departure from common practice regarding the disqualification of a district court judge leaves this court open to the charge of politicization. The panel's decision, therefore, thwarts the very goal of section 455: promotion of public confidence in the impartiality of the judicial process. We have been authorized by Senior Judge Gerald W. Heaney to state that if he were permitted, he would vote to grant the petition for rehearing en banc with respect to the disqualification issue.[7]

May 6, 1996

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[7] We note that Independent Counsel's response to the suggestion for rehearing en banc chose not to address the subject of Judge Woods' disqualification.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

V.

JIM GUY TUCKER, WILLIAM J. MARKS, SR., and JOHN H. HALEY

NO. LR-CR-95-117

(Filed Sep. 5, 1995)

MEMORANDUM OPINION

Separate defendant Jim Guy Tucker has moved to dismiss the indictment in this case on the ground that the Independent Counsel exceeded his jurisdiction. The Independent Counsel, by way of response, asserts: (1) that the indictment of the defendants in this case falls within the scope of his prosecutorial jurisdiction; and (2) that even if does not, the referral of the matter to him, as independent counsel, is not subject to judicial review.

I. The Original Authorization for the Investigation of the Defendants.

The Ethics in Government Act of 1978, as amended by the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599 (hereinafter the "Independent Counsel Act"), permits the Attorney General to request that independent counsel be appointed when preliminary investigation discloses that certain high officials in the Executive Department may have violated the law. 28 U.S.C. § 591(b). Other persons can come within the ambit

of the Act if they cannot be investigated and prosecuted by an officer of the Department of Justice without the appearance of a personal, financial, or political conflict of interest. 28 U.S.C. § 591(c)(2).

An independent counsel is appointed by a special three-judge court of the United States Courts of Appeals for the District of Columbia, called the "Special Division." It is significant that the Special Division defines the independent counsel's prosecutorial jurisdiction. This is clear from the first sentence of 28 U.S.C. § 593(b)(3): *"In defining the independent counsel's prosecutorial jurisdiction,* the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and *all matters related to that subject matter."* (Emphasis added.)

Congress reauthorized the original Ethics in Government Act on June 30, 1994, with a few changes. However, prior to the reenactment of the Independent Counsel Act, the Attorney General had conducted an investigation into a land development venture called "Whitewater" in which President Bill Clinton and Mrs. Hillary Rodham Clinton were investors, along with another partner, James McDougal. Because there was no independent counsel act in effect at the time, the Attorney General herself named Robert B. Fiske, Esquire, as independent counsel to further investigate the Whitewater venture.

After the reenactment of the Independent Counsel Act, the Special Division replaced Mr. Fiske with Kenneth

Starr, Esquire, and authorized a continuation of the Whitewater investigation in the following terms:

> Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether any individuals or entities have committed a violation of federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.; it is
>
> ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Kenneth W. Starr, Esquire, of the District of Columbia bar, with offices at Kirkland and Ellis, 655-15th Street, NW, Washington, DC 20005, be and he is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

> The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, *by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.* (See Exhibit A.) (Emphasis added.)

Such was the jurisdictional authority defined by the Special Division, which had the sole statutory duty to define such jurisdiction.

In affixing this limitation on the jurisdictional grant, the Special Division was undoubtedly mindful of the *caveat* of the Supreme Court of the United States in *Morrison v. Olson:*

> [W]e do not think that Congress may give the Division *unlimited* discretion to determine the independent counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

487 U.S. 654, 679 (1988) (Emphasis original).

What "gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case" was that the President was a "person" requiring appointment of an Independent Counsel. [28 U.S.C. § 591(b)(1).]

The subject matter of the indictment at issue here bears no relation whatsoever to the Clintons or James

McDougal or their relationship with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. The following affidavit of Governor Tucker, dated July 7, 1995, and attached to his motion to dismiss the indictment on jurisdictional grounds has not been controverted:

> Jim Guy Tucker, on oath, states as follows:
>
> 1. I am not and have never been a part of the Executive Branch of the United States Government.
>
> 2. I have examined the indictment in this case. To my certain knowledge no member of the Executive Branch of the United States Government participated in any transaction to which the indictment refers.
>
> 3. To my certain knowledge neither the President of the United States nor his First Lady have had any connection whatever with the business matter called, in the indictment, "LMS," Cablevision Management, Inc. ("CMI") or any other entity to which the indictment refers.
>
> Further Affiant sayeth not. /s/ Jim Guy Tucker, (See Exhibit B.)

The Independent Counsel has come forward with no evidence to refute facts recited in the affidavit. Nor has he alleged a connection of any kind between Governor Tucker and President Clinton. This is not surprising. The Court takes judicial notice of the fact that President Clinton and Governor Tucker were political opponents during the years covered by this indictment. In 1982, Tucker

opposed Clinton in the Democratic primary for Governor of the State of Arkansas. In 1990, when President Clinton made his last race for Governor of Arkansas, Tucker threatened to oppose him until virtually the last moment and then decided to run for Lieutenant Governor. The fact that these two men have been leaders of opposing factions in the Democratic party in Arkansas is well-known. That they would have been connected in any type of business venture in the period covered by the indictment would be highly unlikely, and Tucker's uncontroverted affidavit establishes this.

In fact, in his response to defendant's motions attacking jurisdiction, independent counsel conceded that there is no connection between the facts alleged in the indictment and the Clintons, McDougal and Capital Management Services, Inc. "Although the facts do not link Defendants to a specific relationship among CMS, the Clintons, or James B. McDougal, the Attorney General reasonably concluded that the LMS [Landowners Management System, subject of Count III of the indictment] matter was 'related to the independent counsel's prosecutorial jurisdiction' under Section 594(e) sufficiently to fall within that jurisdiction." (Response of the United States to Defendants' Motion to Dismiss Indictment for Lack of Jurisdiction, p. 38.) How can it be said that the Attorney General *reasonably* concluded that there was a connection between the matter in the indictment and the Clintons and McDougal, if there was no actual connection? The position of the Independent Counsel is that whether the Attorney General's conclusion was reasonable or not, such conclusion is not subject to review by a

district court, or by any court for that matter. This issue will be dealt with *infra*.

II. The Grant of Supplemental Authorization.

The Independent Counsel went back to the Attorney General with the request that the Attorney General seek authorization under 28 U.S.C. § 594(e) from the Special Division to investigate matters alleged in Count III of the indictment.[1] For some unknown reason, no request was ever made regarding the allegations contained in Counts I and II of the indictment. The Attorney General responded to the Independent Counsel by letter dated September 2, 1994:

> The Attorney General has received your letter of August 31, 1994 requesting that the Department of Justice refer to the Office of Independent Counsel/Madison Guaranty Bank related matters pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that these matters are related to your investigation and that referral to your Office would be appropriate. We therefore refer investigative and prosecutorial jurisdiction over the following matters to your Office:
>
> > (1) Whether any person committed any federal crime relating to the bankruptcy action entitled *In Re: Landowners Management System, Inc., Tax Identification No.*

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[1] Section 594(e) deals with referral of "other matters" to an independent counsel.

> *75-2001914, Debtor,* United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11) . . . (See Exhibit C.)

The Special Division issued an order of December 19, 1994, and this order provided in pertinent part as follows:

> Upon consideration of the Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed under seal, it is
>
> HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matters be referred to the Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 2I U.S.C. § 594(E):
>
> Whether any person committed any federal crime relating to the bankruptcy action entitled *In Re: Landowners Management System, Inc., Tax Identification No. 75-2001914, Debtor.* United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11) . . . (See Exhibit D.)

However, this order contained the following limitations after the grant of authority mentioned above:

> IT IS FURTHER ORDERED that, as a result of the referral of the above-described matters and the jurisdictional grant made by this Court on August 5, 1994, Kenneth W. Starr has full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Authorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or

> infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.
>
> The Independent Counsel further has jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation . . . (See Exhibit D.)

Obviously, from the Special Division's own order, the supplemental investigation was required to be "connected with or arising out of that investigation." "That investigation" is the investigation of the Clintons and McDougal mentioned in the preceding paragraphs.

In placing such a limitation on the jurisdiction of the independent counsel, the Special Division may well have had in mind the Supreme Court's interpretation of 28 U.S.C. § 594(e) in *Morrison v. Olson:*

> In our view, this provision does not empower the court to expand the original scope of the counsel's jurisdiction; that may be done only upon request of the Attorney General pursuant to § 593(c)(2). *At most § 594(e) authorizes the court simply to refer matters that are "relate[d] to the independent counsel's prosecutorial jurisdiction," as already defined.*

487 U.S. 654, 680, n.18 (1988) (Emphasis added).

III. The Power to Review the Attorney General's Referral of the Matters Contained in Count III to the Independent Counsel.

It is obvious that the matters contained in Count III of the indictment, which the Attorney General has referred to the Independent Counsel, are completely unrelated to the Clintons and McDougal. Even though 28 U.S.C. § 594(e) under which the referral was made requires that the Attorney General "refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction," the Attorney General and Independent Counsel argue that the referral is not reviewable. It is not reviewable even if completely wrong and without support in the statute or in the order of the Special Division.

I cannot accept the proposition that a citizen can be put on trial in my court for a loss of his liberty and that no court has the power to determine whether there is jurisdiction to proceed in the matter.

The Attorney General argues on page 18 of her brief: "Under the terms of Section 594(e), the process does not even require the involvement of the Special Division." While the wording of 28 U.S.C. § 594(e) may be susceptible to such an interpretation, the Supreme Court has indicated that referrals under this section are a part of the powers and duties of the Special Division:

> The Act also vests in the Special Division various powers and duties in relation to the independent counsel that, because they do not involve appointing the counsel or defining his or her jurisdiction, cannot be said to derive from the Division's Appointments Clause authority.

> These duties include . . . referring matters to the counsel upon request, § 594(e). . . .

Morrison v. Olson, 487 U.S. 654, 680.

But even assuming that the Independent Counsel is correct and that it is not necessary for the Attorney General to seek approval of the Special Division before referring matters to the Independent Counsel, the Attorney General faces the same jurisdictional obstacles as the Special Division. 28 U.S.C. § 594(e) requires referral only as to "matters related to the independent counsel's prosecutorial jurisdiction."

Significantly, the Attorney General, through Mr. Keeney, the Acting Assistant Attorney General, made the following statement in the letter of September 2, 1994, to Mr. Starr, in regard to the bankruptcy matter:

> To the extent you determine that as[pects of these matters which might fall technically within the broad scope of your jurisdiction are not sufficiently related to your mandate to warrant handling by your office, you may refer those aspects back to the Department of Justice for handling pursuant to 28 U.S.C. § 597(a).

Thus, we have clear recognition by the Attorney General that the matters in the indictment must be "sufficiently related to your mandate." Not only were the matters contained in the indictment insufficiently related to the mandate, they were not related at all.

In the matter at bar, the Attorney General did not attempt to proceed without the involvement of the Special Division. Even so, there are limits on the scope of

prosecutorial jurisdiction which the Special Division can confer:

> We emphasize, nevertheless, that the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications. . . . [T]he Division's exercise of unauthorized powers risks the transgression of the constitutional limitations of Article III that we have just discussed.

Morrison v. Olson, 487 U.S. 654-685 (Emphasis original). In a footnote to the last sentence, the Court stated: "After all, in order to decide whether to refer a matter to the counsel, the court must be able to determine whether the matter falls within the scope of the original grant. See n.18 *supra*." 487 U.S. at 685 n.18. (Footnote 18 is quoted in its entirety, *supra*.) Surely the Independent Counsel and Attorney General do not suggest that there can be no judicial review of prosecutorial jurisdiction of an independent counsel. If this were so, the Special Division would be virtually the only court in American jurisprudence, save the Supreme Court of the United States, whose decisions are subject to no judicial review whatsoever, regardless of whether those decisions are patently contrary to law. Such a precedent would be both novel and dangerous.

The Independent Counsel finds a nexus to the Clintons and McDougal to satisfy the above requirements in the fact that, while investigating their relationship to Capital Management Services, Inc., counsel fortuitously

stumbled across the defendants' alleged violation of the law. (See Response of United States to Defendants' Motions to Dismiss Indictment for Lack of Jurisdiction. p. 36.) In support, the Independent Counsel quotes from *United States v. Secord,*: "To determine that one occurrence is 'related' to another, one need only show that there is a reasonable causal or logical connection between the two, some tenable correlation between events." 725 F.Supp. 563, 566 (D.D.C. 1989). The relation between the indictment herein and McDougal or the Clintons falls far short of this test.

The facts demonstrating the alleged relationship are stated by the Independent Counsel as follows: "Information that Defendant Tucker may have asserted a claim as a creditor in a fraudulent bankruptcy filed by Landowners Management Systems, Inc., was first provided to Independent Counsel Fiske by a witness in the investigation of Capital Management Services, Inc. Additional investigation determined that an alledgedly fraudulent loan from Capital Management Services was used as collateral to finance the purchase of cable television interests. . . . " (See Response of United States, *supra*, p. 37.)

This argument is without merit because the "original jurisdiction order" only deals with Capital Management Services, Inc. in the following context: " . . . whether any individuals or entities have committed a violation of federal criminal law . . . whether any individual or entities have committed a violation of federal criminal law . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation,

or Capital Management Services, Inc." (See Exhibit A, order of Special Division, dated August 5, 1994.)

The original grant thus was only in reference to the Clintons' and McDougal's relationship to Capital Management Services, Inc., not to anyone else's relation to this entity. For another individual or entity to be related, such individual or entity would necessarily have to be involved in the Clintons' or McDougal's relationship to Capital Management Services, Inc.

The Independent Counsel goes on to say: "These facts show that the matters under indictment are related to the subject matter of the Independent Counsel's investigation." These facts show nothing of the kind, which Independent Counsel concedes in the next sentence: "Although the facts do not link Defendants to a specific relationship among CMS, the Clintons or James B. McDougal. . . . "

In a footnote on page 38 of his brief on jurisdiction, the Independent Counsel argues that there is a relation in the fact that Capital Management Services, Inc. is one of the entities listed in the grant of original jurisdiction and the Count III allegations were discovered during the investigation of this entity. As stated above, the record is devoid of evidence of *any* relationship or connection between the Clintons and McDougal and any of the matters alleged in the indictment.

Admittedly, certain actions of the Attorney General are not subject to review. The decision to refer or not to refer a matter to the Independent Counsel is not subject to review. Whether to investigate a person and whether to require appointment of an independent counsel is not

subject to review. The cases cited on this issue are not on point and are thus not persuasive. *Dellums v. Smith*, 797 F. 2d 817 (9th Cir. 1986) involved a suit by a member of Congress and two private citizens over the Attorney General's failure to conduct a preliminary investigation of a particular allegation. The Ninth Circuit held that, "failure to discharge these duties is not subject to federal court challenge by private citizens." In *Banzhaf v. Smith*, 737 F. 2d 1167, 1170 (D.C. Cir. 1984), the question was whether refusal to conduct a preliminary investigation is reviewable.

All of these situations are a far cry from the question of whether the trial court has jurisdiction – whether the Attorney General and the Special Division completely exceeded their authority in referring a non-related matter to the Independent Counsel. In at least one instance, the action of the Attorney General in referring a matter to the independent counsel was reviewed by the Special Division. The Special Division found that the matter had been improperly referred by the Attorney General because of lack of prosecutorial jurisdiction. See, *In re: Meese*, 907 F. 2d 1192, 1199-1201 (D.C. Cir. 1990). The *Meese* Opinion includes a quote from the Application to Define Jurisdiction of Independent Counsel made by James C. McKay, independent counsel in that case:

> It does not appear [under the Act], however, that the Acting Attorney General has the power to define the *prosecutorial jurisdiction* of an independent counsel, See 28 U.S.C. § 593(c). That power is vested only in this court, which has not formalized a definition of Independent Counsel McKay's prosecutorial jurisdiction in the Meese matter.

> Application to Define Jurisdiction of Independent Counsel, *In re Nofziger/Meese,* Div. No. 87-1 (Aug. 6, 1987). . . .

Meese, 907 F.2d at 1200-01 (Emphasis original). This comports with the plain meaning of the statute, as examined and noted earlier in this opinion.

IV. Conclusion.

The Independent Counsel, in his brief at page 29, asks: What is the harm if the Independent Counsel handles this investigation rather than the Attorney General? What difference does it make? It makes a great deal of difference if the statute and the Supreme Court plainly state that only matters related to the Independent Counsel's original prosecutorial jurisdiction are to be handled by him. In the first place, criminal statutes and criminal procedures must be faithfully followed. To gloss over and shortcut the requirements of criminal statutes is the first step toward tyranny. If the statute says that the Independent Counsel should not make the decision to prosecute in an unrelated matter, but that this decision shall be made by the Attorney General, it makes a great deal of difference.

Few would disagree with Justice Scalia's statement in his dissent in *Morrison v. Olson, supra,* at 708 that: " . . . the balancing of various legal, practical and political considerations, none of which is absolute, is the very essence of prosecutorial discretion." The vast power and immense discretion the Independent Counsel seeks to wield in this case must find its genesis in the statute or in

the courts' interpretation of the statute. I do not find it here.

The words of Justice Robert Jackson, in an address, *The Federal Prosecutor,* delivered at the Second Annual Conference of United States Attorneys April 1, 1940, were quoted by Justice Scalia in his dissent in *Morrison v. Olson, supra,* at 728. These words bear repeating here:

> What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.
>
> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being

> attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself . . .

It is certainly true that the United States Attorney of the Attorney General may find in their discretion that these defendants have violated the law and that they should be indicted and prosecuted. However, such discretion is theirs to exercise. It is not granted to an independent counsel under the statutes or decisions of our courts in this particular matter.

While the Supreme Court has upheld the constitutionality of the Ethics in Government Act, *Morrison v. Olson, supra,* cannot be read without drawing the conclusion that the Supreme Court meant that the authority and jurisdiction of an independent counsel should be confined to a narrow channel and not be expanded beyond the explicit wording of the statute. A thoughtful commentator has pointed out that:

> . . . congressional committee requests for independent counsel investigations of *particular named* executive officials bear a frightening resemblance to Bills of Attainder. Bills of Attainder, however, traditionally required at least the approval of the entire legislature (like all other "legislation"). In contrast, independent counsel requests may be triggered by just a few members of Congress serving on a particular committee with an axe to grind. See 28 U.S.C. § 592(g)(1) (1988). Once a partisan request for the appointment of an independent counsel has been made, the Attorney General and the Special Division which oversees such investigations may find it very difficult to avoid appointing a counsel just to clear up the "impressions" that

> were created by the request having been made. And once a counsel is appointed, the pressures to prosecute or to force a plea bargain (as happened with Michael Deaver and Webster Hubbell) are not insignificant. Accordingly, the EIGA independent counsel system is not as far removed from the traditionally hated and unconstitutional Bill of Attainder as many may think.

S.G. Calabresi, "Some Normative Arguments for the Unitary Executive," 48 Ark.L.Rev., p. 93, n.164. (This statement is attributed to Walter Dellinger, III.)

Since its original enactment, the Independent Counsel Act has been used extensively, some would say, including Justice Scalia, that it has been abused, The *Arkansas Law Review* article, cited *supra*, at n.163, points out its wide use:

> During the two years of the Carter Administration that the Ethics in Government Act was in effect, two Independent Counsels were appointed: Arthur Christy investigated White House Chief of Staff Hamilton Jordan and Gerald Gallinghouse investigated White House staffer Timothy Kraft. During the eight years of the Reagan Administration, seven independent Counsels were appointed: Leon Silverman investigated Secretary of Labor Raymond Donovan; Jacob Stein investigated White House Counselor Edwin Meese III; Alexia Morrison investigated Assistant Attorney General Theodore Olson; Whitney North Seymour investigated White House aide Michael Deaver; Laurence Walsh investigated a number of officials for their involvement in Iran-Contra; James McKay investigated Lynn Nofziger, Attorney General

Edwin Meese III, and others; and former Judge Arlin Adams investigated HUD Secretary Samuel Pierce, Jr. During the three years and 11 months of the Bush Administration that the statute was in effect, one additional Independent Counsel was appointed: Joseph DeGenova investigated Secretary of State James Baker and other State Department aides involved in the illegal search of Bill Clinton's passport file. Independent Counsels Laurence Walsh and Arlin Adams continued their investigations throughout this period. During the first two months of the Clinton Administration that the statute has been back in effect, Attorney General Janet Reno has sought the appointment of two Independent Counsel: the first request concerned the Whitewater Investigation and led to the appointment of Kenneth Starr to replace Robert Fiske; the second request concerned Agriculture Secretary Mike Espy and led to the appointment of Donald Smaltz.

During the Clinton Administration, citizens of the State of Arkansas have undergone wide-ranging investigations by two independent counsel. Some of these, on the surface at least, would seem to have dubious connection with the original or supplemental grant of prosecutorial jurisdiction.

The history of independent counsel investigations is not reassuring to this Court. Perhaps the most questionable example was the indictment of Defense Secretary Weinberger in the Iran-Contra investigation by an independent counsel. Weinberger was one of two cabinet officials who opposed the Reagan Administration's

involvement in the Iran-Contra affair. Yet, he was the only cabinet official who suffered an indictment.

While Justice Scalia's dissent did not carry the day in *Morrison v. Olson, supra,* he made some highly pertinent observations about the officials having supervision over the independent counsel. He or she is responsible to no elected officials, but only to a panel of three appointed members of the Federal Judiciary.

As Justice Scalia points out the highly successful Teapot Dome and Watergate investigations were carried out by independent counsel named by the Attorney General. Elected members of the Executive Department were ultimately responsible to the electorate for the manner in which these investigations were carried out. Not so with the independent counsel under the current statute. "It seems to me not conducive to fairness. But even if it were entirely evident that unfairness was in fact the result – the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration – *there would be no one accountable to the public to whom the blame could be assigned,*" (*Morrison v. Olson, supra,* at 731, Scalia, J., dissenting) (Emphasis original.)

I am not suggesting that there has been unfairness in the case at bar on the part of the Independent Counsel or the Special Division. I do believe, as does Justice Scalia, that the potential is present in the Independent Counsel Act. I have no idea what the proof will be on this indictment. I am firmly convinced, along with the majority in *Morrison v. Olson, supra,* that the prosecutorial jurisdiction

of the Independent Counsel must be strictly contained within its statutory bounds.

There are, undoubtedly, situations that may justifiably call for the appointment of independent counsel. At any rate, Congress has made such a determination. The wisdom of this statute is not for me to decide. This does not mean that the judiciary is not the proper department of our government to delineate the bounds of the statute's prosecutorial jurisdiction. I am at least empowered initially to make this determination. If we are to remain a government of laws and not of men, it must ever be so.[2]

It is evident from this opinion that I am convinced that the Independent Counsel had no jurisdiction to present the matters contained in this indictment to the grand jury. In my view, this jurisdiction was vested in the Attorney General or the United States Attorney for the Eastern District of Arkansas. It was within their sole jurisdiction to exercise their discretion as to whether the indictment should be obtained in this matter.

It, therefore, follows that this indictment must be quashed as to all defendants. Parenthetically, I add that I deal with an important issue in this case. Fortunately, all my decisions are subject to higher review.

I will do everything in my power to have an expeditious appeal of this decision to the Court of Appeals and to the Supreme Court. In this endeavor, I can pledge

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[2] I had never realized until reading Justice Scalia's opinion in *Morrison v. Olson, supra,* that the origin of this principle is to be found in the Massachusetts Constitution of 1780. [487 U.S. at 697.]

the support of my clerk and court reporter. The defendants have stated that they seek a quick disposition of this matter. I am sure the government joins in these sentiments. I can assure all concerned that I am also anxious for a quick resolution.

It would be foolish to put these parties to an extensive and expensive trial when there exists a serious, and in my view, fatal defect of jurisdiction. Lack of jurisdiction can be successfully raised at any point in litigation. How patently unfair would it be after the stress and expense of a long trial to have a determination made at a later stage of the proceedings that there was no jurisdiction in the first place?

An order will be entered in conformity with this opinion quashing this indictment in its entirety as to the three defendants. All other motions except those relating to jurisdiction are rendered moot.

DATED this 5th day of September, 1995.

/s/ Henry Woods
UNITED STATES
DISTRICT JUDGE

Entered on the Docket in accordance with Rule 55 FRCrP on 9/5/95 By C. Wofford

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association

Division No. 94-1

Order Appointing Independent Counsel

(Filed Aug. 5, 1994)

Before: SENTELLE, *Presiding* and BUTZNER and SNEED, *Senior Circuit Judges.*

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether any individuals or entities have committed a violation of federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Kenneth W. Starr, Esquire, of the District of Columbia bar, with

offices at Kirkland and Ellis, 655 – 15th Street, NW, Washington, DC, 20005, be and he is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such

matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. The Court, having reviewed the motion of the Attorney General that Robert B. Fiske, Jr., be appointed as Independent Counsel, has determined that this would not be consistent with the purposes of the Act. This reflects no conclusion on the part of the Court that Fiske lacks either the actual independence or any other attribute necessary to the conclusion of the investigation. Rather, the Court reaches this conclusion because the Act contemplates an apparent as well as an actual independence on the part of the Counsel. As the Senate Report accompanying the 1982 enactments reflected, "[t]he intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the Department of Justice. Throughout our system of justice, safeguards

exist against actual or *perceived* conflicts of interest without reflecting adversely on the parties who are subject to conflicts." S. Rep. No. 496, 97th Cong., 2d Sess. at 6 (1982) (emphasis added). Just so here. It is not our intent to impugn the integrity of the Attorney General's appointee, but rather to reflect the intent of the Act that the actor be protected against perceptions of conflict. As Fiske was appointed by the incumbent administration, the Court therefore deems it in the best interest of the appearance of independence contemplated by the Act that a person not affiliated with the incumbent administration be appointed.

It further appearing to the Court in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this appointment pursuant to 28 U.S.C. § 592(e) and of the ongoing public proceedings and interest in this matter, that it is in the best interests of justice for the identity and prosecutorial jurisdiction of the Independent Counsel to be disclosed,

IT IS SO ORDERED.

Per Curiam
For the Court:

/s/ Ron Garvin
Ron Garvin, Clerk

EXHIBIT B

STATE OF ARKANSAS)
) §§
COUNTY OF PULASKI)

AFFIDAVIT OF JIM GUY TUCKER

Jim Guy Tucker, on oath, states as follows:

1. I am not and have never been a part of the Executive Branch of the United States Government.

2. I have examined the indictment in this case. To my certain knowledge no member of the Executive Branch of the United States Government participated in any transaction to which the indictment refers.

3. To my certain knowledge neither the President of the United States nor his First Lady have had any connection whatever with the business matter called, in the indictment, "LMS", Cablevision Management, Inc. ("CMI") or any other entity to which the indictment refers.

Further Affiant sayeth not.

/s/ Jim Guy Tucker
Jim Guy Tucker

SUBSCRIBED AND SWORN to me before this the 7th day of July, 1995.

/s/ Linda J. West
Notary Public

My Commission Expires:

OFFICIAL SEAL
LINDA J. WEST
NOTARY PUBLIC – ARKANSAS
PULASKI COUNTY
My Commission Expires JUNE 30, 2003

EXHIBIT C

[SEAL]

U.S. Department of Justice
Criminal Division

Office of the
Assistant Attorney General

Washington, D.C. 20530

September 2, 1994

Mr. Kenneth W. Starr
Two Financial Centre
10825 Financial Centre Parkway
Suite 134
Little Rock, Arkansas 72211

Dear Mr. Starr:

The Attorney General has received your letter of August 31, 1994 requesting that the Department of Justice refer to the Office of Independent Counsel/Madison Guaranty Bank related matters pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the the course of the investigation conducted by the Office of Independent Counsel, she has

concluded that these matters are related to your investigation and that referral to your Office would be appropriate. We therefore refer investigative and prosecutorial jurisdiction over the following matters to your Office:

(1) Whether any person committed any federal crime relating to the bankruptcy action entitled *In Re: Landowners Management Systems, Inc., Tax Identification No 75-2001914, Debtor,* United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11); and

REDACT REDACT REDACT

Your jurisdiction affords you necessary flexibility in structuring your investigation. To the extent you determine that aspects of these matters which might fall technically within the broad scope of your jurisdiction are not sufficiently related to your mandate to warrant handling by your office, you may refer those aspects back to the Department of Justice for handling pursuant to 28 U.S.C. §597(a).

Should you wish at any time to consult with the Department of Justice concerning Departmental policies with respect to these criminal tax or other matters, 28 U.S.C. § 594(f)(1), I invite you to contact Lee J. Radek, Chief, or Jo Ann Farrington, Deputy Chief, Public Integrity Section, Criminal Division, who will put you in touch with the appropriate Departmental officials. They can be reached at (202) 514-1412.

To complete our files, I would appreciate your providing Mr. Radek with a copy of your notification to the Special Division of the Court of this referral. 28 U.S.C.

§ 594(e). Please let me know if I can be of any further assistance to you in the course of your investigation.

Sincerely,

/s/ John C. Keeney
John C. Keeney
Acting Assistant Attorney General
Criminal Division

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division of the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association	Division No. 94-1 UNDER SEAL (Filed Dec. 19, 1994)

ORDER

Upon consideration of the Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed under seal, it is

HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matters be referred to the Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 28 U.S.C. § 594(e):

REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT

Whether any person committed any federal crime relating to the bankruptcy action entitled *In re: Landowners Management Systems, Inc., Tax Identification No. 75-2001914, Debtor,* United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11);

REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT

IT IS FURTHER ORDERED, that, as a result of the referral of the above-described matters and the jurisdictional grant made by this Court on August 5, 1994, Kenneth W. Starr has full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel further has jurisdiction and authority to investigate other allegations or evidence

of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation, including, but not limited to:

REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT

Whether any person committed any federal crime relating to the bankruptcy action entitled *In re: Landowners Management Systems, Inc., Tax Identification No. 75-2001914, Debtor,* United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11);

REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT
REDACT	REDACT	REDACT

The Independent Counsel has jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel has jurisdiction and authority to seek indictment and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a

violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel has all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

The Independent Counsel, as authorized by 28 U.S.C. § 594, has prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

IT IS FURTHER ORDERED, that the Independent Counsel may disclose, to those persons who are the subject of the matters referred to the Independent Counsel and their counsel, those portions of this Order relating to such subjects provided that:

(1) A person to whom disclosure is permitted to be made shall receive a copy of this Order from which all matters will be redacted from pages 1 through 4 except those pertaining to the person to whom disclosure is made; and

(2) Each recipient of the redacted Order shall sign a Statement of Acknowledgement and Consent in the form attached hereto.

Per Curiam
For the Court:

IT IS SO ORDERED.

/s/ Ron Garvin
Ron Garvin, Clerk

Dated: December 19, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

APPLICATION TO THE COURT PURSUANT TO 28 U.S.C. § 592(c)(1) FOR THE APPOINTMENT OF AN INDEPENDENT COUNSEL IN RE MADISON GUARANTY SAVINGS & LOAN ASSOCIATION	)	No. (Filed Jul. 1, 1994)

In accordance with the Independent Counsel Reauthorization Act of 1994 (the "Act"), I hereby apply to the Special Division of the Court for the appointment of an Independent Counsel to investigate whether any violations of federal criminal law were committed by James B. McDougal or any other individual or entity relating to Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

Background. In October 1993, the Resolution Trust Corporation (RTC) referred a number of allegations to the Office of the United States Attorney for the Eastern District of Arkansas arising out of an inquiry into the administration of Madison Guaranty Savings & Loan Association, a defunct Arkansas savings and loan association that was owned by James B. McDougal, who had been a partner with William and Hillary Clinton in Whitewater Development Corporation.

During the same time period, the Office of the United States Attorney for the Eastern District of Arkansas was

prosecuting David Hale, an Arkansas municipal court judge who had ties both to the Clintons and to McDougal, for fraud against the Small Business Administration relating to the operation of Hall's investment company, Capital Management Services, Inc. While plea negotiations were underway, Hale made a number of allegations against former associates, including McDougal and the Clintons, concerning the misuse of funds of Capital Management Services.

In November 1993, the Fraud Section of the Criminal Division of the Department of Justice took over the prosecution of Hale and the inquiry into the RTC allegations of misapplication of funds from Madison Guaranty, several of which it determined to be sufficiently specific and credible to provide grounds for preliminary investigation.

On January 20, 1994, I appointed Robert B. Fiske, Jr., as regulatory independent counsel to take over all investigations relating to Madison Guaranty Savings & Loan Association. Mr. Fiske received the following authority:

> (a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association, (2) Whitewater Development Corporation, or (3) Capital Management Services.

(b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

(c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal law, in connection with any investigation of the matters described in part (a) or (b) of this section.

(d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute or bring civil actions against, any persons or entities involved in any of the matters referred to in part (a), (b), or (c) who are reasonably believed to have committed a violation of any federal criminal or civil law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

28 C.F.R. § 603.1.

Independent Counsel Fiske has not reported to the Department of Justice concerning his investigative results

or the direction of his investigation.[1] However, he has reviewed this Application and has affirmed that with respect to the matters referred to him, there exists reasonable grounds to believe that further investigation is warranted pursuant to 28 U.S.C. § 592(c)(1)(A).

Basis for Appointment of Statutory Independent Counsel.

On June 30, 1994, the Independent Counsel Act was reauthorized. I have concluded that the circumstances of this matter call for the appointment of an independent counsel pursuant to 28 U.S.C. § 592(c)(1)(A), because investigation by the Department of Justice of the allegations of violations of criminal law by McDougal and other individuals associated with President and Mrs. Clinton in connection with Madison Guaranty Savings & Loan, Whitewater Development Corporation, and Capital Management Services, Inc., would present a political conflict of interest. See Independent Reauthorization Act of 1994, § 4(a) (amending 28 U.S.C. § 591(c)). Accordingly, I hereby request that the Court appoint a statutory independent counsel as soon as possible, and that the Court appoint Robert B. Fiske, Jr. so that he may continue his ongoing investigation without disruption and with the full independence provided by the Act.[2]

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[1] A copy of a public report dated June 30, 1994, concerning the results of his investigation into the death of Vincent W. Foster, Jr., was provided by Mr. Fiske after its public release on June 30, 1994.

[2] The reauthorizing legislation allows the Court to appoint Mr. Fiske as statutory independent counsel. Independent

Recommended Jurisdiction. Pursuant to 28 U.S.C. § 593(b)(3), I recommend and request that the Special Division of the Court grant the statutory independent counsel the same prosecutorial jurisdiction as that granted to regulatory Independent Counsel Fiske, so that the investigation may continue without interruption. In this connection, I have appended hereto a proposed statement of the scope of prosecutorial jurisdiction for the statutory independent counsel.[3]

Request for Authorization for Public Disclosure. I request that the Court authorize the disclosure of this Application to the public pursuant to 28 U.S.C. § 592(e). The allegations underlying this Application, and Mr. Fiske's mandate as regulatory Independent Counsel, are known to the public. I believe that the public interest will

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Counsel Reauthorization Act of 1994, § 7(h). I appointed Mr. Fiske on the basis of his record of independence and his outstanding qualifications, and he has been investigating this matter as an independent prosecutor for five months. His staff, selected by him, is established and is fully engaged in the investigation. Appointment of a different independent counsel would seriously disrupt the investigation.

[3] The intent of the proposed statement of independent counsel's prosecutorial jurisdiction is to give him exactly the same jurisdiction as that given to regulatory Independent Counsel Fiske, except that as regulatory Independent Counsel, Mr. Fiske was also given civil jurisdiction. To ensure that the full scope of Mr. Fiske's independent civil investigation continues uninterrupted and without limitation, it is my intention to continue Mr. Fiske's regulatory appointment for this purpose, or, to name whomever the Court may select as statutory independent counsel as an independent special attorney to handle all civil aspects of the investigation as she or he deems appropriate.

be served by the disclosure of the Application. I have submitted a separate motion and proposed order to this effect.

Respectfully submitted,

/s/ Janet Reno
Janet Reno
Attorney General of the United States

DATED: June 30, 1994

STATEMENT OF JURISDICTION OF INDEPENDENT COUNSEL

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity

developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 18 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

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(2) (2) (2)

Nos. 95-2008, 95-2013 and 95-2070

In the Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
JUL 26 1996
CLERK

WILLIAM J. MARKS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

JIM GUY TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN HALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR *
Independent Counsel

STEVEN M. COLLOTON
Associate Counsel

Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

* Counsel of Record

30 pp

QUESTIONS PRESENTED

1. Whether, under the facts and circumstances of the investigation by the independent counsel, the Attorney General of the United States properly referred a particular "related matter" to the independent counsel for investigation and prosecution.

2. Whether, under the specific circumstances of this case, the court of appeals correctly concluded that the appearance of judicial bias or partiality warranted reassignment, pursuant to 28 U.S.C. § 2106, to a different district judge.

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§ 591(c)(1) 4
§ 592(c) 3
§ 593(b)(3) 4, 13
§ 594(e) 2, 5, 6, 11, 13, 14, 18, 19
28 U.S.C. § 2106 ..... 3, 12, 22, 23
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28 C.F.R. § 603.1(a) 7
28 C.F.R. § 603.1(b) 7

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-2008

WILLIAM J. MARKS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 95-2013

JIM GUY TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 95-2070

JOHN HALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Tucker Pet. App. 1-28) is reported at 78 F.3d 1313. The order of the court of appeals denying petitions for rehearing and suggestions for rehearing *en banc*, along with the opinion of two dissenting judges (Tucker Pet. App. 29-46), is published at 82 F.3d 1423. The opinion of the district court (Tucker Pet. App. 47-68) is reported at 898 F. Supp. 654.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1996. Petitions for rehearing and suggestions for rehearing *en banc* were denied on May 6, 1996. The petitions for a writ of certiorari were filed on June 13, 14, and 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Title 28, United States Code, Section 594(e) provides:

> An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel

> accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

Title 28, United States Code, Section 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Other relevant portions of the Ethics in Government Act, 28 U.S.C. §§ 591-599, are set forth at Tucker Pet. App. 87-101.

STATEMENT

1. On July 1, 1994—one day after enactment of the Independent Counsel Reauthorization Act of 1994—the Attorney General of the United States, acting pursuant to 28 U.S.C. § 592(c), applied to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels ("Special Division") for the appointment of an independent counsel. (Marks Pet. App. 86-92). On August 5, 1994, the Special Division appointed the undersigned to that position. (Tucker Pet. App. 69-72).

The Attorney General's application recounted that in October 1993, the Resolution Trust Corporation (RTC) referred a number of allegations to the United States Attorney for the Eastern District of Arkansas concerning an Arkansas financial institu-

tion known as Madison Guaranty Savings & Loan and one of its principal owners, James B. McDougal. (Marks. Pet. App. 86). The application noted that McDougal had been a partner with President William Jefferson Clinton and First Lady Hillary Rodham Clinton in an Arkansas real estate venture known as Whitewater Development Corporation. (*Id.*). The Attorney General further explained that during that same time period, the United States Attorney was prosecuting David L. Hale, a Little Rock municipal judge, for fraud against the Small Business Administration. (*Id.* at 86-87). The fraud related to Capital Management Services, Inc., a federally-licensed small business investment company owned by Hale. (*Id.* at 87).

The Attorney General explained that while plea negotiations were underway between Hale and the United States Attorney in Little Rock, Hale made a number of allegations against former associates, including James McDougal, President Clinton, and Hillary Rodham Clinton, concerning the misuse of funds of Capital Management Services. (*Id.*). The Attorney General requested appointment of an independent counsel because investigation by the Department of Justice of the matters described in her application "would present a political conflict of interest." (*Id.* at 89).[1]

In accordance with 28 U.S.C. § 593(b)(3), the Special Division appointed the independent counsel

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[1] The Ethics in Government Act permits the Attorney General to seek appointment of an independent counsel to investigate and prosecute persons who are not officials of the Executive Branch if she determines that investigation or prosecution by the Justice Department "may result in a personal, financial, or political conflict of interest." 28 U.S.C. § 591(c)(1).

and defined his jurisdiction. The Special Division's order of August 5, 1994, provided:

> [The independent counsel] is hereby appointed . . . with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the [Act] *whether any individuals or entities* have committed a violation of any federal criminal law . . . *relating in any way* to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. (Tucker Pet. App. 69) (emphasis added).

In addition, the order granted the independent counsel jurisdiction to investigate and prosecute "other allegations or evidence of violation of *any federal criminal law . . . by any person* or entity *developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.*" (emphasis added) (*Id.* at 70). The order also conferred "prosecutorial jurisdiction to fully investigate and prosecute the subject matter . . . as hereinbefore set forth, and *all matters and individuals whose acts may be related to that subject matter . . . .*" (*Id.* at 71) (emphasis added).

Shortly after the appointment, on August 31, 1994, the newly constituted Office of the Independent Counsel ("OIC") requested, pursuant to 28 U.S.C. § 594(e), that the Attorney General refer to the OIC a particular "related" matter—the investigation and possible prosecution of any violations of federal criminal law relating to a bankruptcy action entitled *In re: Landowners Management Systems, Inc., Tax*

Identification No. 75-2001914, Debtor, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11). By letter dated September 2, 1994, the Attorney General referred that matter. Acting Assistant Attorney General Keeney, speaking for the Attorney General, informed the OIC of the Attorney General's conclusion that the Landowners Management Systems bankruptcy matter is "related to your investigation." (Tucker Pet. App. 74). Based upon this specific prosecutorial judgment, Mr. Keeney stated that "[w]e therefore refer investigative and prosecutorial jurisdiction" to the OIC. (*Id.* at 75).[2]

2. The Attorney General referred the Landowners Management Systems bankruptcy matter to the OIC in the context of an ongoing criminal investigation that had begun in 1993. The Special Division's appointment of an independent counsel marked the third change in the prosecutorial authority vested with responsibility for investigating the matters then assigned to the OIC. As noted, the prosecution of David Hale was initiated by the United States Attorney's Office in Little Rock, and the RTC made criminal referrals to that same office in 1993. On November 5, 1993, however, after the publication of national news stories about Hale's allegations and the RTC's investigation of Madison Guaranty, the United States Attorney recused herself and her staff from

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[2] On September 12, 1994, in accordance with Section 594(e) of the Act, the OIC notified the Special Division of the Attorney General's referral. On December 16, 1994, in an abundance of caution, the independent counsel applied to the Special Division for an Order of Referral regarding the Landowners Management Systems bankruptcy action. On December 19, 1994, the Special Division also referred the matter to the OIC. (Tucker Pet. App. 76-79).

further investigation and prosecution of matters pertaining to Capital Management Services and Madison Guaranty.

As a result, a team of trial lawyers from the Fraud Section of the Criminal Division was assigned to undertake the prosecution of Hale and the investigation into matters concerning Capital Management Services, Madison Guaranty, and Whitewater Development. The Fraud Section continued its investigation through early 1994.

On January 20, 1994, after a request by President Clinton, the Attorney General announced the appointment of Robert B. Fiske, Jr., as an independent counsel pursuant to Justice Department regulations. *See* 28 C.F.R. § 600.1.[3] Mr. Fiske's regulatory jurisdiction included authority to investigate "whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services." 28 C.F.R. § 603.1(a). The regulation went on to grant Mr. Fiske "jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation." *Id.* § 603.1(b). Mr. Fiske thus assumed responsibility for all aspects of the ongoing investiga-

[3] At the time, the portions of the Ethics in Government Act that provided for a court-appointed independent counsel were not in effect. *See* 28 U.S.C. §§ 591-599.

tion, including the prosecution of David Hale and his codefendants.

On March 22, 1994, Hale pleaded guilty to a two-count information. Hale's plea agreement, requiring his cooperation with Mr. Fiske's office, was filed in open court. Thereafter, during interviews of David Hale, Mr. Fiske's office learned of allegations of fraudulent activity relating to petitioner Tucker and his cable company interests.

Mr. Fiske's office then investigated whether petitioner Tucker and others had committed any violation of federal law, including tax offenses, with respect to a claim Tucker asserted as a secured creditor in the Landowners Management Systems bankruptcy action. Tr. 29-30. As of the date of the Special Division's appointment of an independent counsel under the reauthorized statute, Mr. Fiske's office was actively investigating whether the use of a fraudulent bankruptcy proceeding to obtain tax benefits would justify a prosecution for federal tax violations.

In her July 1994 application for appointment of an independent counsel, the Attorney General requested that the Court grant the statutory independent counsel "the same prosecutorial jurisdiction as that granted to regulatory Independent Counsel Fiske, so that the investigation may continue without interruption." (Marks Pet. App. 90) (emphasis added). The Special Division granted the Attorney General's request and defined the independent counsel's jurisdiction in criminal matters at least as broadly as the jurisdiction granted to Mr. Fiske. (Tucker Pet. App. 69-72). Accordingly, the new independent counsel from the outset—without interruption—continued the investigation of matters under examination by Mr. Fiske's office, including the Landowners Management Systems bankruptcy.

3. The investigation by the newly constituted OIC, building upon the work of Mr. Fiske, led to the grand jury's indictment of June 7, 1995. All three petitioners were charged with one count of conspiring to defraud the United States by impeding the collection of revenue by the Internal Revenue Service. Petitioners Tucker and Marks each were charged with one count of making a false statement to a small business investment company (Capital Management Services) to obtain a $300,000 loan, and one count of conspiring to do so. (Tucker Pet. App. 13).

The case was assigned to United States District Judge Henry Woods.[4] Petitioners moved to dismiss the indictment on the ground that the OIC did not have jurisdiction to prosecute the offenses charged. Briefs were filed in July 1995, and Judge Woods scheduled a hearing for September 5, 1995. In the meantime, on August 17, 1995, the same grand jury returned a second indictment, which charged petitioner Tucker, James McDougal, and Susan McDougal with various offenses relating to Madison Guaranty and Capital Management Services. *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Aug. 17, 1995).[5]

On September 5, 1995, the district court held a hearing on the motions to dismiss the June 7 indictment. On the same day, the court ordered the indictment dismissed.

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[4] The case was assigned to Judge Woods after Judge Elsijane Roy recused herself. We note that other judges, in both the Eastern District of Arkansas and the Eighth Circuit, have seen fit to recuse themselves from all matters pertaining to the ongoing OIC investigation.

[5] A trial of these charges began in March 1996, and ended on May 28, 1996, with convictions of all three defendants.

The district court rejected the contention, pressed by both the OIC and the Attorney General as *amicus curiae*, that the Attorney General's decision to refer a related matter to an independent counsel is not subject to judicial review. (Tucker Pet. App. 56). The district court then reasoned that the matters charged in the June 7 indictment were "not related at all" to the OIC's jurisdictional mandate. (*Id.* at 57). Accordingly, the district court concluded that the Attorney General could not refer those matters to the OIC, and that the decision whether to prosecute the offenses alleged was vested only in the Attorney General or the United States Attorney for the Eastern District of Arkansas. (*Id.* at 67).

4. The court of appeals reversed. The court held that the Attorney General's decision to refer related matters to an independent counsel is not subject to judicial review. The court noted that prosecutorial decisions of the Attorney General long have been committed to the prosecutor's discretion. (Tucker Pet. App. 6-7). In addition, the court concluded that the definitive answer to the question of reviewability is found in the legislative history of the Ethics in Government Act. (*Id.* at 7). The report of a Conference Committee in 1987, the court explained, reflects explicitly the Committee's intent that "an Attorney General's determinations under the independent counsel law are not subject to judicial review." (Tucker Pet. App. 9).

Alternatively, the court of appeals held that even if the Attorney General's referral decision were subject to judicial review, the offenses charged in the June 7 indictment are related to the OIC's jurisdiction. The court reiterated that, as the statute is writ-

ten, "relatedness" is "an essentially standardless concept," because the term "related" is "undefined and without parameters." (*Id.* at 14). The court rejected as unduly narrow petitioners' argument that a "related matter" referred by the Attorney General to the OIC must be related to James McDougal's or President Clinton's or Mrs. Clinton's relationship to Capital Management Services or Madison Guaranty or the Whitewater Development Corporation. (*Id.* at 17). Instead, the court concluded that "relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." (*Id.* at 18).

The court of appeals had "no difficulty" concluding that the June 7 indictment was sufficiently related to the OIC's mandate. (*Id.*). The court noted that there was an overlap in witnesses and defendants between the June 7 indictment of petitioners and the August 17 indictment of petitioner Tucker and the McDougals, which was at the heart of the OIC's original jurisdiction. The court further explained that there was a clearly defined relationship between Tucker and McDougal, Capital Management Services, and Madison Guaranty—all three of which were specifically named in the order defining the OIC's jurisdiction. Finally, the court observed that Capital Management Services was an entity named in the original jurisdictional order, and that material false statements to Capital Management Services by petitioners Tucker and Marks were alleged in the June 7 indictment. (*Id.*)

Having concluded that the case should be remanded for trial, the court of appeals turned to the government's request that the case be reassigned to a different judge on remand. The court held that the OIC

properly made the request to the court of appeals in the first instance, because the appellate court's authority to assign a case to a different judge on remand is premised on 28 U.S.C. § 2106, not on the recusal statutes alone. (Tucker Pet. App. 24-25). The court concluded that reassignment on remand was necessary to ensure the appearance of impartiality. (*Id.* at 29).

The court explained that information in the public domain, of which it could properly take judicial notice, demonstrated a close personal relationship between Judge Woods and President and Mrs. Clinton. (*Id.* at 21-22). The court also observed that petitioner Tucker had portrayed his prosecution as an attempt to embarrass President Clinton politically, and that President Clinton made a public speech solidifying his connection with Tucker at a lunch the day after Tucker's arraignment. (*Id.* at 22). In sum, the court concluded that given the high profile of the OIC's work and the reported connections among Judge Woods, the Clintons, and petitioner Tucker, reassignment was the proper course. (*Id.* at 26).

The full court of appeals denied petitioners' suggestions for rehearing en banc. (*Id.* at 29). Two judges voted to grant the suggestions and published a dissenting opinion. (*Id.* at 30-46). A third judge voted to rehear only the issue whether the case should be reassigned, but did not join the dissenting opinion.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this litigation is at an interlocutory stage, and judicial efficiency would be better

served by deferring any review until rendition of final judgment. Further review is therefore not warranted.

1. a. The Ethics in Government Act requires the Special Division to define an independent counsel's jurisdiction adequately to investigate the "subject matter" of the Attorney General's application and "all matters related to that subject matter." 28 U.S.C. § 593(b)(3). The Act also provides a procedure for an independent counsel to confirm whether his jurisdiction, as conferred by the Special Division, extends to a particular matter. That procedure is set forth in Section 594(e) of the Act. If an independent counsel believes that a matter is *related to* (and therefore encompassed within) the jurisdiction defined by the Special Division, he may request the Attorney General or the Special Division to refer that matter to the independent counsel. Upon determining that the matter is related, the Attorney General or the Special Division, as the case may be, may thereupon refer the matter. 28 U.S.C. § 594(e). The OIC scrupulously followed that statutorily-ordained procedure in this case. (Tucker Pet. App. 74-75).

Petitioners continue to assert that the court of appeals' principal holding—that the Attorney General's decision to refer a related matter to an independent counsel is not subject to judicial review—conflicts with this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988). They are wrong. *Morrison* did not address—directly or otherwise—the issue presented in this case.

At bottom, petitioners profoundly misunderstand *Morrison*. The principal questions presented there were whether the delegation of Executive and ap-

pointment powers *to a court* (the Special Division) contravened the Appointments Clause, Article III, or the principle of separation of powers. In upholding the statute, this Court took pains to emphasize the limited role of the Judiciary (through the Special Division) and the centrality of the Attorney General's role under the Ethics in Government Act. *Morrison*, 487 U.S. at 696.

In urging a conflict between the court of appeals' decision and *Morrison*, petitioners invoke *Morrison*'s holding that an independent counsel's jurisdiction as initially defined by the Special Division must be "demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of an independent counsel . . . ." 487 U.S. at 679. (Tucker Pet. 10-11; Marks Pet. 21; Haley Pet. 11). This badly misses the mark. The "demonstrable relationship" requirement is a limitation on the authority of the Special Division to define an independent counsel's original jurisdiction. That requirement stems from constitutional problems spawned by vesting additional Executive power in an Article III court. Nothing in *Morrison* even remotely suggests that judicial review of the Attorney General's actions under the Act is necessary to ensure the constitutionality of the statute. To so transmogrify *Morrison*'s concern as to judicial intrusion (at Congress' instance) into the province of the Executive bespeaks a wildly ill-conceived theory of separation of powers. Indeed, the Special Division itself explained recently that its own authority under Section 594(e), which was discussed in *Morrison*, 487 U.S. at 680 n.18, "contrasts with the Attorney General's broader referral power, *which is*

not constrained by separation-of-powers concerns." *In re Espy*, 80 F.3d 501, 507 (D.C. Cir. Sp. Div. 1996) (emphasis added).

Petitioners' repeated invocation of the Constitution and *Morrison* cannot mask this decisive point: Executive power in this case (the assignment of jurisdiction to a federal prosecutor) was exercised by a principal officer of the Executive Branch (the Attorney General of the United States), not by a court. That pivotal fact ends any separation-of-powers concern and defeats any contention that the decision below conflicts with *Morrison*.

b. Petitioners also err in invoking *Heckler v. Chaney*, 470 U.S. 821 (1985). (Marks Pet. 12; Haley Pet. 8). Petitioners argue that the decision is inconsistent with discussion in *Chaney* concerning the presumption of judicial review of enforcement action by an agency.

The presumption of judicial review is inverted here, where the administrative action involved is the Attorney General's exercise of prosecutorial discretion. To return to first principles: there is a long tradition of deference to prosecutorial judgments of the Executive Branch, and the presumption in that context is against judicial review. This Court and the courts of appeals have held time and again that —unlike typical review of administrative agency actions—fundamental prosecutorial decisions are subject to limited or no judicial review. *E.g.*, *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (absent evidence of unconstitutional motive, decisions whether or not to prosecute, and what charges to bring before a grand jury, are within realm of prosecutorial discretion); *Ullman v. United States*,

350 U.S. 422, 431-34 (1956) (determination by United States Attorney that public interest requires immunity is not reviewable).[6]

c. In any event, the court of appeals indulgently allowed for the presumption of reviewability urged by petitioners. In response to petitioners' argument, the court recognized this Court's statement that "judicial review of executive action 'will not be cut off *unless there is persuasive reason to believe that such was the purpose of Congress.*'" (Tucker Pet. App. 12 (quoting *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2231 (1995) (emphasis in court of appeals' opinion) (internal citations omitted)). After carefully examining the text, structure, and history of the Ethics in Government Act, however, the court expressly found that the evidence of congressional

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[6] *See also United States v. Gonzalez*, 58 F.3d 459, 462 (9th Cir. 1995) ("Separation-of-powers concerns generally require a district court to defer to the government's decision to seek a dismissal of a criminal charge because a denial of the motion would represent an intrusion upon prosecutorial prerogative"); *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir.) ("while district courts may reject charge bargains in the sound exercise of judicial discretion, concerns relating to the doctrine of separation of powers counsel hesitancy before second-guessing prosecutorial choices"), *cert. denied*, 115 S. Ct. 2258, 2259 *and* 116 S. Ct. 133 (1995); *United States v. Hooks*, 848 F.2d 785, 802 (7th Cir. 1988) (where prosecutor declines to immunize defense witness, defendant must "make a substantial evidentiary showing that the government intended to distort the judicial fact-finding process before we will depart from the strong tradition of deference to prosecutorial discretion"); *United States v. Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973) (courts are presumed to follow United States Attorney's determination to accept plea agreement because "[h]e alone is in a position to evaluate the government's prosecution resources").

purpose to preclude judicial review of the Attorney General's determination is "more than just persuasive, it is beyond reasonable dispute." (Tucker Pet. App. 12) (internal quotations omitted).

d. As if more were needed, the holding below concerning reviewability does not merit further review for another reason: the court held alternatively that even if the Attorney General's referral were subject to judicial review, then the Landowners Management Systems bankruptcy matter was "related" to the OIC's jurisdiction. Thus, even were petitioners to prevail on their reviewability claim, they would gain no relief, unless the Court were to revisit the fact-bound holding of the court of appeals concerning relatedness and reverse on that score as well.

2. Petitioners argue that the court of appeals also erred by holding, under the facts and circumstances of the independent counsel's investigation, that the Landowners Management Systems bankruptcy matter was related to the subject matter of the OIC's jurisdiction. That alternative holding is quintessentially factbound. The court of appeals' decision pursuasively explains the relationship between the OIC's original jurisdiction, as represented by the August 17 Tucker-McDougal indictment, and the June 7 indictment of petitioners. (Tucker Pet. App. 18). Moreover, the court had before it the fact that petitioner Tucker's ability to borrow $300,000 from Capital Management Services, as charged in the June 7 indictment, was a direct consequence of the fraudulent scheme involving McDougal, Madison Guaranty, and Capital Management Services that was charged in the August 17 indictment. The court's factually-laden conclusion concerning "relatedness" is correct and does not warrant further review.

a. Contrary to petitioner Marks' contention, the decision does not adopt a standard of "administrative convenience" to determine "relatedness" for purposes of 28 U.S.C. § 594(e). The phrase "administrative convenience"—repeated throughout Marks' petition in quotation marks as though it were actually part of the decision—appears nowhere in the opinion of the court of appeals. Rather, the court held that "relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." (Tucker Pet. App. 18). That interpretation of "relatedness" has been endorsed subsequently by the Special Division, *In re Espy*, 80 F.3d at 507-08, and there is no decision to the contrary.

b. The court of appeals' interpretation of the statutory term "related" affords due deference to the Attorney General's construction of a statute that she is charged with administering. The Justice Department, as *amicus curiae* in the courts below, enumerated the factors that may inform an Attorney General's referral decision under Section 594(e):

- whether the same subject or target of an investigation is involved;
- whether there has been similar conduct by some of the parties already being investigated;
- whether there is a significant overlap in potential witnesses, and a resulting potential for interference with an independent counsel's investigation;
- whether the additional matters arise out of the same underlying facts as the original jurisdiction;

- whether the same legal issues are likely to be involved;
- the nature of the new allegations against a person who may be a key witness in an independent counsel's investigation; and
- which prosecutorial body can most efficiently investigate and prosecute the matter.

Brief *Amicus Curiae* of the Department of Justice, filed in No. 95-3268EALR, at 14.

These factors are important to the effective conduct of complex white collar criminal investigations. Petitioners' vision of Section 594(e)—a simple comparison between the face of an indictment and an independent counsel's jurisdictional mandate—conveniently ignores the reality of complex financial-crimes investigations. As the Justice Department explained as *amicus* below, an independent counsel's investigation may uncover evidence of criminal activity committed by a potential witness in a matter at the center of the independent counsel's jurisdiction. Under those circumstances, the Attorney General should enjoy discretion to refer that witness's prosecution to the independent counsel so that, for example, the independent counsel can seek the witness's cooperation in the balance of his investigation.

Or, as here, an independent counsel conducting a detailed review of activities of financial institutions may uncover criminal offenses that do not involve Executive Branch officials covered by the provisions of the Ethics in Government Act. The Justice Department urged, rightly, that "it is contrary to every consideration of judicial and prosecutorial efficiency to deprive the Attorney General of discretion to refer that criminal activity to the independent counsel."

Brief of the Department of Justice at 17. There is no evidence that Congress intended to reject the Justice Department's sensible construction of "related." Further review of the Attorney General's factbound relatedness determination is not warranted.

c. Finally, the interlocutory stage of this litigation counsels against review of the court of appeals' holding that the OIC enjoys jurisdiction to prosecute this case. Even if this Court were to conclude that the decision presents any substantial constitutional or statutory issue, the better course is to wait for this litigation to proceed to final disposition below. If petitioners are convicted, then the Court will be in a position efficiently to consider all claims in a single petition and determine whether review is warranted.

3. Petitioners Tucker and Marks also urge this Court to consider whether the court of appeals correctly determined, on the facts and circumstances of this litigation, that the case should be remanded to a different district judge for trial. The decision below correctly applied settled legal principles to the circumstances of this case. Further review is not warranted.

Petitioners urge that the decision conflicts with the conclusion of other courts of appeals that there is a timeliness requirement for recusal motions filed under 28 U.S.C. § 455(a). Petitioners contend that because the OIC did not move in the district court to recuse Judge Woods, the court of appeals should not have been free to reassign the case on remand.

The authorities cited by petitioners, however, are inapposite to the relief sought by the OIC and granted by the court of appeals. Petitioners cite several cases in which courts of appeals have implied

a timeliness requirement for recusal motions pursuant to 28 U.S.C. § 455(a).[7] The decisions cited by petitioners involve attempts by a party to obtain reversal of a district court's judgment based on the failure of the district judge to recuse. These courts have concluded that a party appealing an adverse ruling should not be able to obtain relief from a judgment based on a disqualification claim that was known, but not raised, in the district court.

In this case, by contrast, the court of appeals did not act pursuant to the recusal statute, 28 U.S.C. § 455(a). The OIC did not urge that the district court's order dismissing the indictment should be reversed because Judge Woods should have recused. The court of appeals reversed solely on the ground that the judgment was wrong as a matter of law. The court addressed the government's request for reassignment only after concluding that the indictment should be reinstated. (Tucker Pet. App. 21, 24-25).

The reassignment of this case to a different judge was based on the court of appeals' statutory authority—independent of the recusal statutes—to require

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[7] *United States v. Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994); *The El Fenix v. M/Y Johanny*, 36 F.3d 136, 141 (1st Cir. 1994); *In re Anwiler*, 958 F.2d 925 (9th Cir.), *cert. denied*, 506 U.S. 882 (1992); *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1420-21 (Fed. Cir.), *cert. denied*, 490 U.S. 1947 (1989); *Parker v. Conners Steel Co.*, 855 F.2d 1510, 1526 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Willner v. University of Kansas*, 848 F.2d 1023, 1028 (10th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989); *Phillips v. Amoco Oil*, 799 F.2d 1464, 1472 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

"such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. (Tucker Pet. App. 23). The decision is consistent with this Court's explanation of the reassignment power, *see Liteky v. United States*, 114 S. Ct. 1147, 1156-57 (1994), and the decisions of several courts of appeals that recognize an appellate court's independent authority to reassign a case on remand. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam); *United States v. Bertoli*, 40 F.3d 1384, 1411 (3d Cir. 1994), *cert. denied*, 116 S. Ct. 1425 (1996); *O'Rourke v. City of Norman*, 875 F.2d 1465, 1475 (10th Cir.), *cert. denied*, 493 U.S. 918 (1989); *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam); *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir.), *cert. denied*, 479 U.S. 988 (1986); *Dyas v. Lockhart*, 705 F.2d 993, 997-98 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983); *United States v. Garcia*, 694 F.2d 294, 296 (1st Cir. 1982) (per curiam); *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (per curiam).

The Ninth Circuit, in the course of reassigning a case to a different district judge, explained the flaw in petitioners' timeliness argument:

> We are not acting under the disqualification statutes, which a party must first invoke before the district court. Instead, this court is being asked in the first instance to exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by

> such reassignment. We do not believe that the statutory provisions concerning disqualification are either exhaustive or the exclusive method whereby a judge may be removed from hearing a case. . . . [T]he appellate court's authority to reassign exists apart from the judicial disqualification statutes. There is simply nothing in the disqualification statutes to prohibit this court from taking appropriate action in the first instance.

United States v. Sears, Roebuck & Co., 785 F.2d at 780-81. Since the decision in this case, the Eighth Circuit itself has distinguished between an appellate court's reassignment power pursuant to 28 U.S.C. § 2106, which does not require a prior recusal motion in the district court, and the recusal statute, 28 U.S.C. § 455(a), which has an implied timeliness requirement. *In re Kansas Public Employees Retirement Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996).

Petitioners also complain that the court of appeals should not have taken judicial notice of news reports and other information in the public domain that demonstrated an appearance of judicial bias or partiality. (Marks Pet. 27). The courts of appeals, however, have considered news articles that shed light on the appearance of bias by a trial judge, including articles that recount interviews with the judge himself. *In re IBM Corp.*, 45 F.3d 641, 642-43 (2d Cir. 1995); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992); *In re Continental Airlines Corp.*, 901 F.2d 1259, 1261 & n.1, 1263 n.3 (5th Cir. 1990), *cert. denied*, 113 S. Ct. 87 (1992). Petitioners cite no case that conflicts with the proposition that a

court of appeals has discretion to take judicial notice of reliable information in the public domain.[8]

Moreover, this case is a poor vehicle for the Court to consider the nuances of the doctrine of judicial notice. Petitioners have not disputed any of the facts relied upon by the court of appeals in its reassignment order. They thus present only an abstract theoretical challenge to a procedural decision of the court of appeals. The court of appeals correctly concluded that the circumstances of this case warranted reassignment. (Tucker Pet. App. 23).

This case has been delayed over one year by the erroneous dismissal of the indictment. Further review of petitioners' factbound claims for the sole purpose of determining which judge will preside at trial is not warranted.

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[8] The cases cited by the two judges dissenting from the denial of rehearing are not to the contrary. (Tucker Pet. App. 39). In three of those cases, the court found that information reported in newspaper articles was demonstrably inaccurate or explained by other information. *United States v. Darden*, 70 F.3d 1507, 1536 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1449 *and* 64 U.S.L.W. 3855 (1996); *Miller v. Tony and Susan Alamo Foundation*, 924 F.2d 143, 147 (8th Cir. 1991); *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351, 1356 n.4 (6th Cir. 1988). In contrast, the court of appeals in this case noted that "[n]owhere do the appellees give us reasons for concluding that the matters the Independent Counsel has brought to our attention do not create an appearance of bias." (Tucker Pet. App. 23). In the fourth case cited by the dissent from denial of rehearing, the Tenth Circuit found that a television interview granted by the district judge required his removal. *United States v. Cooley*, 1 F.3d 985, 994 (10th Cir. 1993).

CONCLUSION

The petitions for a writ of certorari should be denied.

Respectfully submitted.

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